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BEFORE THE ARIZONA CORPORATION COMMISSION

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Arizona Corporation Commission

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JUN 15 2011

COMMISSIONERS

GARY PIERCE, Chairman

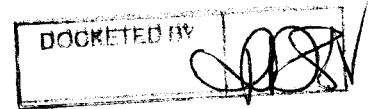
PAUL NEWMAN

SANDRA D. KENNEDY

BOB STUMP

BRENDA BURNS

AZ CORP COMMISSION  
DOCKET CONTROL



IN THE MATTER OF THE  
APPLICATION OF BLACK MOUNTAIN  
SEWER CORPORATION, AN ARIZONA  
CORPORATION, FOR A  
DETERMINATION OF THE FAIR  
VALUE OF ITS UTILITY PLANT AND  
PROPERTY AND FOR INCREASES IN  
ITS RATES AND CHARGES FOR  
UTILITY SERVICE BASED THEREON.

NO. DOCKET NO. SW-02361A-08-0609

**BOULDERS HOMEOWNERS'  
ASSOCIATION'S MOTION FOR  
PLANT CLOSURE ORDER**

(Expedited Consideration Requested)

The Boulders Homeowners' Association ("BHOA"), by and through undersigned counsel, submit this Motion for Plant Closure Order ("Motion").

**INTRODUCTION**

In Decision No. 71865 (September 1, 2010), the Arizona Corporation Commission approved an agreement for closure of the Black Mountain Sewer Corporation's ("BMSC" or "Company") Boulders Wastewater Treatment Plant (the "Treatment Plant" or "Plant") upon the occurrence of certain conditions, including BMSC reaching an agreement with the Boulder's Resort ("Resort") for the termination of an Effluent Delivery Agreement ("Effluent Agreement") by which the Resort purchases all the effluent from the Plant. BMSC and the Resort have negotiated in an attempted to reach an agreement for the termination of the Effluent Agreement, but their negotiations have reached an impasse. In light of the apparent impossibility of this condition to be satisfied, BHOA asks that the Commission order BMSC to close the Treatment Plant, thereby relieving BMSC of its contractual obligation to provide effluent to the Resort and allowing BMSC to expeditiously close the Treatment Plant. The record in this proceeding has already

1 permitted the Commission to make a number of findings in Decision No. 71865 that  
2 justify closure of the Treatment Plant, therefore BHOA does not believe that hearing is  
3 necessary to further develop a factual record to support a plant closure order. BHOA  
4 requests that the Commission, or its Administrative Law Judge, schedule a procedural  
5 conference so that other parties to the proceeding inform the Commission of their  
6 positions on the Motion.

### 7 **BACKGROUND**

8 In the middle of the Boulders residential community, which straddles the border of  
9 the Town of Carefree and the City of Scottsdale, sits the Boulders Wastewater Treatment  
10 Plant (the "Treatment Plant"). BMSC, which operates the Treatment Plant, has an  
11 agreement (the "Effluent Agreement") with the Resort to sell to the Resort all of the  
12 effluent generated by the Treatment Plant, which effluent is about 10 percent of the total  
13 effluent the Resort requires to irrigate of its golf courses.<sup>1</sup> The Effluent Agreement is in  
14 effect through 2021, and prevents the Company from unilaterally closing the plant and  
15 cutting off the Resorts' supply of the effluent. The Effluent Agreement<sup>2</sup> is attached  
16 hereto as Attachment "A".

17 In the Company's 2005 rate case, BHOA intervened and brought to the  
18 Commission's attention the odor issues related to BMSC's sewer operations. The odor  
19 problem was severe and pervasive throughout a broad portion of the Boulders  
20 subdivision. Testimony and public comment suggested that the odors arose from both the  
21 Treatment Plant and the collection system, but some thought corrections to the collection  
22 system would be the most efficient initial steps to take to see if those less costly  
23 corrections could solve the odor problems. In Decision No. 69164 in that rate case, the  
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25 <sup>1</sup> Tr. at 121. ("Tr." refers to the transcript of the November 2009 hearing in this docket.) The Resort obtains  
26 the remainder of its effluent requirements from the City of Scottsdale.

<sup>2</sup> The Effluent Agreement was admitted as Exhibit BHOA-3 at the November 2009 Hearing in this docket.

1 Commission required Company to implement one of the two proposed solutions in order  
2 to "mitigate" the odor problems. Decision No. 69164 at 43 (relevant excerpts attached  
3 hereto as Attachment "B"). The Decision expressed the Commission's desired goal as  
4 "odor remediation in the Boulders community." *Id.* at pg. 37, fn 13. The Commission  
5 further indicated that it believed that action should be taken to advance a solution "that  
6 will enable all customers...to enjoy fully their property without enduring offensive  
7 odors." *Id.* at 37.

8 Despite the Company's improvements to the collection system in response to  
9 Decision No. 69164, which did alleviate a small portion of the pervasive odors, strong  
10 odor problems persisted. In the Company's 2008 rate case, over five hundred public  
11 comments were lodged with the Commission (letters, petitions and appearances at the  
12 public comment portion of the hearing) confirming the ongoing odor problems.  
13 Commenters indicated the impacts of the odors on their lifestyle, including interruption of  
14 Thanksgiving dinner on the patio, inability to leave windows open to enjoy fresh air,  
15 noises from operation of the plant disturbing sleep, embarrassment to host guests who  
16 may experience intense odors, and golfers who must hold their breath as they pass the  
17 Plant while playing the course. It had become clear that odor problem identified by the  
18 Commission in Decision No. 69164 in fact was originating in both the collection system  
19 and the Treatment Plant and that upgrades to the collection system alone had not  
20 remedied the full problem.

21 BHOA intervened in the Company's 2008 rate case, and prior to the filing of direct  
22 testimony, negotiated a Wastewater Treatment Plant Closure Agreement (the "Closure  
23 Agreement") setting forth terms and conditions under which BMSC agreed to close the  
24 Treatment Plant. The Closure Agreement is attached hereto at Attachment "C".<sup>3</sup> One of  
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26 <sup>3</sup> The Closure Agreement was Exhibit B to Hearing Exhibit BHOA-4 (Peterson District).

1 the conditions to the Company closing the Treatment Plant was the Resort agreeing to  
2 termination of the Effluent Agreement (the "Effluent Condition").<sup>4</sup>

3 The record of the hearing in this docket already contains extensive testimony about  
4 the Treatment Plant, its history, the odor and noise issues and prior efforts to eliminate  
5 odors. It would be impossible to operate a wastewater treatment plant without producing  
6 some odors. Tr. at 144 (Sorenson). If the Treatment Plant were constructed today, it  
7 would require a setback of 500 to 1,000 feet (Tr. at 161-162 (Sorenson)), but the  
8 Treatment Plant is located only 100 feet from three homes, and there are 200-300 homes  
9 within 1,000 feet of the Plant. Hearing Exh. BHOA-4 at 4 (Peterson).

10 At the hearing, no party opposed closure of the Treatment Plant *per se*. Rather,  
11 RUCO objected to the establishment of a recovery mechanism for costs BMSC will incur  
12 to close the Treatment Plant. The Commission established the recovery mechanism over  
13 RUCO's objections. Both Staff and RUCO presented witnesses that testified that the  
14 odor issues should be remedied. Tr. at 652 (Haines), Tr. at 544 (Rigsby); Exh. R-7 at 3  
15 (Rigsby). A host of public commenters also bemoaned the odors that customers  
16 experience, which are extremely offensive and interrupt their enjoyment of their  
17 properties. Tr. at 10-34 (public comments).

18 In Decision No. 71865 (September 1, 2010) (the "Decision"), the Commission  
19 found that the Closure Agreement, as modified and clarified in the Decision, represented  
20 a reasonable resolution of the ongoing odor concerns<sup>5</sup> (relevant excerpts (pages 36-55)  
21 attached hereto as Attachment "D"). Pages 49-51 of Decision No. 71865 highlight some  
22 of the public comments made to the Commission in the 2008 rate case. The Commission  
23 concluded that closure of the Treatment Plant was appropriate in light of the  
24 "overwhelming and extraordinary level of participation and comment in support of

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25  
26 <sup>4</sup> The Effluent Condition is set forth in paragraph 2(a)(iv) of the Closure Agreement.

<sup>5</sup> Decision No. 71865, Finding of Fact No. 34.

1 closure of the Boulders WWTP.” Decision No. 71865 at 49. The Commission went on to  
2 state that “[w]e do not believe that customers should be required to endure offensive  
3 odors at levels and frequencies that have been described in the public comments provided  
4 in this case.” *Id.*

5 The Commission has already determined that the record established in this  
6 proceeding supports closure of the Treatment Plant.

7 **THE COMPANY HAS BEEN UNABLE TO REACH AGREEMENT REGARDING**  
8 **TERMINATION OF THE EFFLUENT AGREEMENT, BUT THE ODORS**  
9 **CONTINUE.**

10 Despite what appears to be BMSC’s good faith efforts to negotiate with the Resort  
11 for a termination of the Effluent Agreement, BMSC and the Resort have failed to agree to  
12 such a termination, and it appears that the negotiations have reached an impasse.  
13 Recently, the Resort, through its counsel, issued to BMSC the letter attached as  
14 Attachment “E” in an effort to “enforc[e] its rights” under the Effluent Agreement.

15 Though progress on the negotiations has ceased, unfortunately the odors have not.  
16 Odors from the Treatment Plant over the last several months have been as severe, if not  
17 worse, than ever. In fact, one nearby resident filed a lawsuit against the Company,  
18 seeking, among other remedies a preliminary injunction ordering BMSC to close the  
19 Treatment Plant pending trial on the merits.<sup>6</sup> And several residents have recently filed  
20 public comment letters in this docket indicating the ongoing nature of the odors from the  
21 Treatment Plant, which letters they had delayed in sending to the Commission in the  
22 hopeful expectation that BMSC and the Resort would reach an agreement to terminate the  
23 Effluent Agreement (several recent public comment letters are attached hereto as  
24

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25 <sup>6</sup> CV2011-004077, Maricopa County Superior Court. BHOA understands that after the suit was filed, the  
26 homeowner was forced to move out of his home due to the strong and persistent odors and that the parties thereafter  
stipulated to vacating the preliminary injunction hearing, but that the remainder of the lawsuit is pending.

1 Attachment "F").

2 **THE COMMISSION SHOULD ORDER THE COMPANY TO CLOSE THE**  
3 **TREATMENT PLANT.**

4 Due to the ongoing odor issues that cannot otherwise be alleviated, BHOA  
5 requests that the Commission order BMSC to close the Treatment Plant.

6 The Commission has already determined that the odor problem is so egregious that the  
7 Treatment Plant should be closed

8 The Commission has previously stated that the odors in the community should be  
9 remediated and that all customers should be able to fully enjoy their homes without  
10 enduring offensive odors. Decision No. 69164 at 34 (lines 24-26), 37. In Decision No.  
11 71865 the Commission found that the Plant is more than 40 years old, that it was not  
12 intended to be a permanent sewer treatment solution, that houses were built closer to the  
13 Plant than was initially intended and than current regulations would permit, that the odors  
14 complained of were originating from the Plant, and that closure of the Plant was the  
15 appropriate solution to the odor problems. Decision No. 71865 at 49-51.

16 The Effluent Condition was included in the Closure Agreement only to satisfy BMSC's  
17 obligations under the Effluent Agreement, but BMSC is relieved of those obligations if a  
18 regulatory order prohibits BMSC from satisfying them.

19 The Effluent Condition was included in the Closure Agreement because BMSC  
20 has contractual obligations to continue to make effluent from the Treatment Plant  
21 available to the Resort.<sup>7</sup> Tr. at 124. The Effluent Agreement also includes BMSC's  
22 agreement that it will not "take any action that would reduce the plant's treatment  
23 capacity." Attachment "A" at 5. But BMSC's obligation to continue to operate the  
24 Treatment Plant is terminated if "any laws, regulations, order or other regulatory

25 \_\_\_\_\_  
26 <sup>7</sup> The only effluent BMSC is obligated to provide to the Resort is the effluent generated by the Boulders East Plant. Attachment "A" at 2, para. 1.

1 requirements prevent or materially limit the operation of" the Treatment Plant.  
2 Attachment "A" at 5. Thus, if the Commission ordered BMSC to close the Treatment  
3 Plant, BMSC would be relieved of its obligations under the Effluent Agreement to  
4 provide effluent to the Resort.<sup>8</sup>

5  
6 The Commission has already concluded it has the authority to order closure of the Treatment Plant

7 The Commission's decision in the Company's 2005 rate case recognized its  
8 authority under A.R.S. §§ 40-321(A), -331(A), -361(B), -202(A) and Article VX § 3 of  
9 the Arizona Constitution to require actions by the Company to resolve odor problems.  
10 Decision No. 69164 at 36-37, 40 (Conclusion of Law No. 3). There, the Company  
11 disputed that the Commission had authority to require it to resolve odor problems when  
12 there was no finding of violation of Maricopa County Environmental Services  
13 Department odor regulations. The Commission disagreed, and concluded that it had its  
14 own independent authority, regardless of whether the County's rules and regulations were  
15 implicated. *Id.*

16 BMSC would be required to comply with an order of the Commission ordering  
17 closure of the Treatment Plant. *See, Ariz. Water Co, v. Ariz. Corp. Comm'n.*, 161 Ariz.  
18 389, 778 P.2d 1285 (App.1989) (confirming Commission's authority to order a public  
19 service corporation to modify its plant facilities for the benefit of its existing customers).  
20 Therefore, upon the Commission's order to close the Treatment Plant, BMSC would be  
21 required to comply, and the Treatment Plant, and the odors it creates, would be  
22 eliminated.

23  
24  
25 <sup>8</sup> BMSC's obligation to provide effluent to the Resort is purely contractual in nature, and does not emanate  
26 from its duties under the Certificate of Convenience and Necessity ("CC&N") it holds from the Commission.  
BMSC's CC&N requires it to provide wastewater service to customers, not to provide water, either potable or effluent.

1 The Commission has already approved a mechanism for the partial recovery of the costs  
2 of closure

3 In Decision No. 71865, the Commission approved a closure surcharge mechanism  
4 whereby BMSC could seek to implement a surcharge for certain of its closure-related  
5 costs after the Treatment Plant is closed but prior to its next rate case. Decision No.  
6 71865 at 53-55. A Commission decision ordering closure of the Treatment Plant without  
7 a negotiated termination of the Effluent Agreement will not have any incremental rate  
8 impacts beyond those contemplated by the Commission's prior approval of the Closure  
9 Agreement.

### 10 CONCLUSION

11 Customers and the general public are continuing to suffer from the noxious odors  
12 generated by the Treatment Plant. The Commission has already concluded that the  
13 Treatment Plant should be closed and that it has the authority to order that it be closed.  
14 Further, the Commission has approved a mechanism for partial recovery of the associated  
15 costs of the closure. The only thing standing in the way of closure of the Treatment Plant  
16 is BMSC's contractual obligation to provide the effluent from the Treatment Plant to the  
17 Resort, but the Commission's order that the Plant be shuttered would relieve BMSC of  
18 that contractual commitment.

19 Based on the factual record previously developed in this docket and the  
20 Commission's findings and conclusions that closure of the Plant is appropriate to protect  
21 the public interest, BHOA requests that the Commission order BMSC to close the Plant  
22 subject to the terms of the Closure Agreement, with the exception of the Effluent  
23 Condition.

24 BHOA requests that the Commission schedule a procedural conference at as soon  
25 as possible to allow the remaining parties to the rate case to inform the Commission of  
26 their positions on the Motion for Plant Closure Order.


///



1 Dated this 15<sup>th</sup> day of June, 2011.

2 RIDENOUR, HIENTON, & LEWIS, P.L.L.C.

3 By

4   
5 Scott S. Wakefield  
6 201 North Central Avenue, Suite 3300  
7 Phoenix, Arizona 85004-1052  
8 Attorneys for Boulders Homeowners'  
9 Association

10 ORIGINAL and 13 copies filed  
11 this 15<sup>th</sup> day of June, 2011 with:

12 Docket Control  
13 Arizona Corporation Commission  
14 1200 W. Washington Street  
15 Phoenix, AZ 85007

16 COPY of the foregoing HAND-DELIVERED  
17 this 15<sup>th</sup> day of June, 2011 to:

18 Commissioner Gary Pierce, Chairman  
19 Commissioner Paul Newman  
20 Commissioner Sandra D. Kennedy  
21 Commissioner Bob Stump  
22 Commissioner Brenda Burns  
23 1200 West Washington Street  
24 Phoenix, AZ 85007

25 Janice Alward, Chief Counsel  
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1 COPY of the foregoing  
2 MAILED/EMAILED this 15<sup>th</sup>  
day of June, 2010 to:

3 Greg Sorenson  
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## INDEX OF ATTACHMENTS

|                |   |
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| Attachment "A" | Effluent Agreement (Hearing Exhibit BHOA-3)             |
| Attachment "B" | Decision No. 69164 (excerpts)                           |
| Attachment "C" | Closure Agreement (Exhibit B to Hearing Exhibit BHOA-4) |
| Attachment "D" | Decision No. 71865 (excerpts)                           |
| Attachment "E" | Letter to Jay Shapiro, June 3, 2011                     |
| Attachment "F" | Recent Public Comment Letters                           |

## **ATTACHMENT “A”**



## **BLACK MOUNTAIN SEWER CORPORATION**

**VIA FACSIMILE: 480-488-9623**

4 May, 2001

Robert Hanus  
President  
WET Inc. (Western Environmental Tech.)  
P.O. Box 4752,  
Cave Creek, Arizona, 85331

**RE: Effluent Delivery Agreement**

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Dear Robert:

As requested, please find attached Effluent Delivery Agreement for the Black Mountain Sewer Corporation as requested. Please read carefully and ensure you understand in detail this agreement and that you govern yourself and your company in accordance with this agreement at all times. If at any time you find that you cannot meet the conditions outlined in this agreement, please ensure that you contact myself or Graham Symmonds immediately or in anticipation of such an event.

Sincerely,

BLACK MOUNTAIN SEWER CORPORATION

Trevor T. Hill P.Eng  
President

cc: Graham Symmonds - VP Engineering - BMSC

Document6

*DA/CA-3*

One Carefree Place  
Box 731  
Suite A2, 36800 N. Sidewinder Dr.  
Carefree, AZ, 85377

Telephone: 480-488-4152 Facsimile: 480-488-8573

## **EFFLUENT DELIVERY AGREEMENT**

THIS EFFLUENT DELIVERY AGREEMENT (this "Agreement") is made this \_\_\_\_ day of March, 2001 between THE BOULDERS CAREFREE SEWER CORPORATION, an Arizona corporation ("BCSC"), and BOULDERS JOINT VENTURE, an Arizona general partnership ("User"), sometimes referred to herein as a "Party" or collectively as the "Parties," for the purposes and consideration set forth hereinafter.

### **RECITALS:**

A. BCSC owns and operates certain wastewater collection and treatment facilities and holds a certificate of convenience and necessity granted by the Arizona Corporation Commission (the "Commission") authorizing BCSC to provide sewer utility service within portions of the Town of Carefree and the City of Scottsdale, Arizona, including the sale of treated effluent ("Effluent") resulting from the operation of BCSC's treatment facilities.

B. User owns and operates a destination resort in north Scottsdale commonly known as The Boulders Resort and Club ("the Resort"). The Resort includes a hotel, clubhouse, pool, tennis courts, various landscaped areas and two 18-hole championship golf courses (the "Golf Courses"), and is located within BCSC's certificated service territory.

C. At the present time, BCSC operates a single wastewater treatment plant known as the Boulders East Plant. This treatment plant currently has a permitted capacity of 120,000 gallons per day ("gpd"). BCSC intends to seek approval to increase the treatment plant's permitted capacity to 150,000 gpd. The remainder of BCSC's wastewater is delivered to the City of Scottsdale for treatment.

D. BCSC currently delivers all of the Effluent produced by the Boulders East Plant to the Resort, pursuant to that certain Agreement, dated March, 18, 1986, as amended by that certain First Amendment to Agreement, dated March 18, 1996. The Resort utilizes the Effluent for

irrigation and maintenance of the turf, trees, shrubs and other landscaping at the Golf Courses, for the filling and refilling of storage reservoirs at the Golf Courses, and for related exterior uses.

E. The Parties desire to enter into a new agreement in order to modify certain terms and conditions, which shall supersede and replace the existing agreement, as amended.

NOW, THEREFORE, for good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the Parties covenant and agree as follows:

**AGREEMENTS:**

1. Purchase and Sale of Effluent. BCSC agrees to sell and deliver and User agrees to purchase and accept delivery of all Effluent generated by the Boulders East Plant subject to the terms and conditions set forth hereinafter.

2. Service and Delivery of Effluent. BCSC shall deliver and User shall accept Effluent as follows:

(a) Quantity of Effluent. BCSC shall deliver to the Resort all Effluent generated by the operation of the Boulders East Plant (or a new wastewater treatment facility which may be constructed by BCSC as contemplated herein). In the event the treatment capacity of the Boulders East Plant is increased to a capacity greater than 150,000 gpd, or a new wastewater treatment facility is constructed by BCSC to replace the Boulders East Plant which produces Effluent in a quantity that is greater than 150,000 gpd, BCSC shall enter into good faith negotiations with User for the purchase by User of amounts of Effluent in excess of 150,000 gpd. The foregoing notwithstanding, nothing herein shall require BCSC to deliver Effluent to User in amounts in excess of 150,000 gpd.

(b) Quality of Effluent. The Effluent delivered by BCSC shall meet all applicable Federal, State of Arizona, and local health and safety standards for non-potable water supplied for turf irrigation and other exterior uses contemplated in this Agreement. BCSC makes no



representations or warranties with respect to any characteristic of the Effluent which is not specifically addressed by the applicable standards or the current re-use permit held by the User with respect to the Effluent. BCSC makes no representation or warranty that the Effluent is suitable for any purpose intended by User and use of the Effluent for any purpose is at the sole risk of the User.

(c) Metered Deliveries; Delivery Point. All deliveries of Effluent to User shall be metered. The meter is presently located immediately adjacent to the Boulders East Plant, which shall constitute the point of delivery. BCSC shall be responsible for the maintenance, repair and replacement of all facilities on BCSC's side of the meter as well as the meter, and User shall be responsible for the maintenance, repair and replacement of all facilities on User's side of the meter. The location of the meter may be changed by the mutual agreement of the parties. The User shall pay all costs associated with the maintenance, testing and certification of the meter.

(d) Service Interruptions by BCSC. BCSC shall use its reasonable efforts to provide a continuous level of service to User. In the event service is to be temporarily discontinued, BCSC shall promptly notify User of the particular circumstances and the estimated length of time during which service will be discontinued. BCSC shall make reasonable efforts to resume normal service as quickly as possible.

(e) Service Interruptions by User. In the event User is unable to accept deliveries of Effluent, User shall pay BCSC as if such Effluent had been delivered in accordance herewith and shall further pay BCSC the reasonable costs incurred by BCSC to dispose of such Effluent. In the event of a temporary interruption of the ability of User to accept Effluent, BCSC shall cooperate with User to minimize the amount of Effluent which cannot be accepted by BCSC. User shall make reasonable efforts to resume acceptance of deliveries of effluent as quickly as possible.

3. Charges for Effluent. The charge for all Effluent delivered to User hereunder shall

be determined from time to time by the Commission in connection with a general rate proceeding or similar proceeding in which all of BCSC's rates and charges for sewer utility service are determined in accordance with applicable laws and regulations. BCSC shall promptly notify User of all requests for modification of the charge for Effluent, and shall provide User, at User's cost, with a complete copy of all requests for rate increases or other rate adjustments, including the application, pre-filed testimony and supporting schedules and other exhibits. If the Commission at any time de-tariffs effluent service or ceases to consider such service a regulated service subject to the Commission's jurisdiction, the charge for Effluent delivered to User shall remain the tariffed charge for at least one year, after which time BCSC may modify the charge for Effluent without Commission approval provided that BCSC and User shall negotiate such modification in good faith. All such charges shall be subject to the provisions of Paragraph 12(a), below.

4. Payment for Effluent Service. User shall be billed for and shall pay for Effluent on a quarterly basis based on the metered quantity of Effluent delivered to User during the preceding calendar quarter plus the amount of any Effluent which BCSC made available but User was unable to accept during such calendar quarter. All amounts payable by User to BCSC hereunder shall be due and payable within twenty-five (25) days of receipt of invoice, and any payment not received within such time shall be considered delinquent and be subject to any late payment penalty authorized by the Commission.

5. Changes to Effluent Standards. In the event that material changes are made to the re-use permit held by the User, or to an Aquifer Protection Permit, or to the quality standards applicable to Effluent used for turf irrigation and related purposes, BCSC shall notify User of those modifications to the facility from which the Effluent is provided or to any retainage features which are required to ensure that such new standards are met. At the option of the User, User shall (a) pay the reasonable costs of such modifications which are required to be made to the facility or retainage

feature for the purpose of complying with the new permit requirements or effluent re-use standards, or (b) terminate this agreement in accordance with Paragraph 12.

6. BCSC's Covenants. BCSC covenants and agrees that BCSC will:

- (a) Operate the Boulders East Plant and the related pipelines, pumps and facilities so as to allow the production and delivery of Effluent to User;
- (b) Maintain in good standing and renew when appropriate all permits and other regulatory approvals necessary for purposes of subparagraph (a);
- (c) Make such repairs, upgrades and improvements to the Boulders East Plant as may be necessary in connection with subparagraph (a); and
- (d) Not restrict, reduce or otherwise limit the quantity of Effluent produced by the Boulders East Plant or take any action that would reduce the plant's treatment capacity except as otherwise provided for in this Agreement.

The obligations of BCSC under this Paragraph shall terminate if physical conditions at the Boulders East Plant or any laws, regulations, orders or other regulatory requirements prevent or materially limit the operation of the Boulders East Plant or render the operation of such plant uneconomic. If economic considerations, technical requirements or regulatory changes require BCSC to close or relocate the Boulders East Plant, BCSC will attempt, in good faith and to the extent technically feasible, to relocate the Boulders East Plant or construct a new wastewater treatment plant at a site that is as close as reasonably possible (taking into account the economics of such relocation or construction) to the Golf Courses. In the event the Boulders East Plant is relocated or a new facility constructed, User will be responsible for the costs of constructing additional pipelines and other facilities necessary to transport the Effluent from such new location to the Resort's delivery point, which upon request of BCSC shall be considered a contribution in aid of construction. BCSC shall be solely responsible for all costs and expenses resulting from the treatment of such pipelines and

facilities as contributions in aid of construction, including (without limitation) (i) costs relating to any easements for pipelines and facilities; (ii) costs relating to meter relocation; (iii) costs relating to maintenance and repair of the pipelines and facilities; and (iv) any income taxes. In the event the relocated or new facility has a larger capacity than the Boulders East Plant, User shall have the right to purchase a maximum amount of 150,000 gpd of effluent. For the purposes of this provision, the term "uneconomic" means that the costs and expenses relating to the treatment and delivery of Effluent, including applicable overheads, would exceed the market price for effluent used for golf course irrigation and similar purposes in Maricopa County.

7. User's Covenants. User covenants and agrees that User will:

- (a) Operate, repair and maintain its storage lakes, pipelines, and other facilities used in connection with the transportation and storage of Effluent provided hereunder in accordance with all applicable laws and regulations; and
- (b) Maintain in good standing and renew when appropriate all permits, including but not limited to Aquifer Protection Permits, and other approvals necessary for User to receive delivery of, store and utilize Effluent for turf irrigation, exterior landscape watering and similar uses.

8. Limitations on Effluent Use. User covenants and agrees that all Effluent delivered to User pursuant to this Agreement shall be used by User in connection with the Resort. User shall not make any changes in the nature of the use of the Effluent nor make any application for changes or amendments to the permit governing the use of the Effluent by the User, which changes or amendments may affect BCSC's operations, without the express written consent of BCSC. User shall not transport Effluent to any location outside of BCSC's certificated service territory, nor shall User sell or agree to sell Effluent to any other person or entity.

9. Indemnity.

(a) Indemnification of User. Subject to the limitations set out herein, BCSC shall indemnify, protect, defend (with legal counsel acceptable to User) and hold User harmless from, and upon demand shall pay or reimburse User for, any and all claims, actions, costs, fees, expenses, damages, environmental investigation costs, obligations, penalties, fines and liabilities (including, without limitation, reasonable attorneys' fees and court costs) arising out of any breach or default in the performance of this Agreement by BCSC or caused by any act, neglect, fault or omission of BCSC or its agents, contractors, employees or servants. User shall not seek indemnification from BCSC for any and all claims, actions, costs, fees, expenses, damages, environmental investigation costs, obligations, penalties, fines and liabilities (including, without limitation, reasonable attorneys' fees and court costs) arising out of the use of Effluent by the User or resulting from any characteristic of the Effluent which is not specifically addressed in the standards which are applicable to the Effluent.

(b) Indemnification of BCSC. User shall indemnify, protect, defend (with legal counsel acceptable to BCSC) and hold BCSC harmless from, and upon demand shall pay or reimburse BCSC for, any and all claims, actions, costs, fees, expenses, damages, environmental investigation costs, obligations, penalties, fines and liabilities (including, without limitation, reasonable attorneys' fees and court costs) arising out of any breach or default in the performance of this Agreement by User or caused by any act, neglect, fault or omission of User or its agents, contractors, employees or servants.

10. Force Majeure. Neither Party to this Agreement shall be liable to the other for failure, default or delay in performing any of its obligations hereunder, other than for the payment of money obligations specified herein, when such failure, default or delay is caused by strikes or other labor problems, by forces of nature, unavoidable accident, fire, acts of the public enemy,

interference by civil authorities, passage of laws, orders of the court, delays in receipt of materials, or any other cause, where such cause is not within the control of the Party affected and which, by the exercise of due diligence, such Party is unable to prevent. Should any of the foregoing occur, the Parties hereto agree to proceed with diligence to do what is reasonable and necessary so that each Party may perform its obligations under this Agreement.

11. Term. This Agreement shall remain in effect for a period of twenty (20) years from the date on page one of this Agreement, unless earlier terminated as provided under Paragraph 12, below. After the expiration of the initial twenty (20) year term, this Agreement shall be automatically renewed for successive five (5) year terms unless a Party provides written notice to the other Party of its election to terminate the Agreement, which notice shall be provided no less than one (1) year prior to the renewal of the Agreement.

12. Termination of Agreement.

(a) Rate Increases. In the event that the charge for Effluent delivered to User under this Agreement increases by more than twenty-five percent (25%) above the charge in effect at the time of any increase in the charge for Effluent or, in the alternative, increases by more than fifty percent (50%) within any five-year period, User, in its sole discretion, may terminate this Agreement by providing notice of its intent to terminate to BCSC on or before sixty (60) days from the date on which the increased charge becomes effective. If such notice is given, this Agreement, and all rights and obligations hereunder, shall terminate without further action one hundred twenty (120) days from the date such notice is delivered to BCSC. In the event that User elects not to exercise its right to terminate this Agreement following any increase in the charges for Effluent, User shall not waive its right to terminate based on future increases in charges.

(b) Termination for Breach. Either Party may terminate this Agreement in the event of a breach or anticipated breach of a material term or condition by the other Party. In such

event, the Party contending that a breach has or will occur shall promptly provide notice thereof to the other Party, and shall initiate proceedings in accordance with Paragraph 14, below.

(c) Termination for Effluent Quality Changes. If User elects not to pay for those modifications to the East Boulders Plant necessary to ensure the Effluent continues to meet changes to the quality standards applicable to the Effluent, this Agreement may be terminated by BCSC upon 120 days written notice to User by BCSC.

13. Notices. Any notice required or permitted to be given hereunder shall be in writing and directed to the address set forth below for the Party to whom the notice is given and shall be deemed delivered (i) by personal delivery, on the date of delivery; (ii) by first class United States mail, three (3) business days after being mailed; or (iii) by Federal Express Corporation (or other reputable overnight delivery service), one (1) business day after being deposited into the custody of such service.

If to BCSC to: Trevor Hill  
Suite 201, 1962 Canso Road,  
Sidney, British Columbia,  
Canada V8L 5V5

with a copy to: Algonquin Power Income Fund  
c/o Peter Kampian  
Algonquin Power Corporation, Inc.  
#210, 2085 Hurontario Street  
Mississauga, Ontario L5A 4G1

If to User to: Boulders Joint Venture  
c/o Wyndham International, Inc.  
1950 Stemmons Freeway, Suite 6001  
Dallas, Texas 75207  
Attention: Legal Department

Any Party may designate another address for notices under this Agreement by giving the other Party not less than thirty (30) days advance notice.

14. Dispute Resolution.

(a) Good Faith Negotiations. For the purpose of dispute resolution, each Party

shall designate an officer or employee to act as its representative (hereinafter, "a Designated Representative"). A Party that believes a dispute exists under this Agreement will first refer the dispute to the Designated Representatives of the Parties for resolution. The Designated Representatives will personally meet and attempt in good faith to resolve the dispute. If the Designated Representatives cannot resolve the dispute within thirty (30) days, a Party that still believes a dispute requires resolution shall avail itself of the provisions of subparagraph (b), below.

(b) Arbitration. If a Party still believes a dispute requires resolution after following the procedures of subparagraph (a), that Party shall provide a detailed written notice of dispute to the other Party setting forth the nature of the dispute and requesting that the dispute be determined by means of arbitration. Immediately following such notice, the dispute shall be submitted for and settled by binding arbitration administered by the American Arbitration Association ("AAA") under its Commercial Arbitration Rules before a single arbitrator. Judgment on the award rendered by the arbitrator may be entered in any court with jurisdiction.

(c) Other Remedies. The preceding subparagraphs are intended to set forth the primary procedure to resolve all disputes under this Agreement. It is expected that all disputes that would traditionally be resolvable by a law court would be resolved under this procedure. However, the Parties recognize that certain business relationships could give rise to the need for one or more of the Parties to seek equitable remedies from a court that were traditionally available from an equity court, such as emergency, provisional or summary relief, and injunctive relief. Immediately following the issuance of any such equitable relief, the Parties will stay any further judicial proceeding pending arbitration of all underlying claims between the Parties. The Parties also recognize that the Commission may have primary jurisdiction over certain issues that may arise between and among the Parties that relate to the provision of public utility service. Accordingly, this paragraph is not intended to prohibit a Party from bringing any such issues to the Commission



for resolution or from taking any position at the Commission that would not be inconsistent with or barred by this Agreement or by collateral estoppel, res judicata or other issue or fact preclusion doctrines.

15. Attorneys' Fees. In the event either Party hereto employs legal counsel or brings a judicial action or any other proceeding against the other Party to enforce any of the terms, covenants or conditions hereof, the prevailing Party in such action or proceeding shall be entitled to recover its reasonable attorneys' fees and costs from the other Party, and in the event any judgment is secured by such prevailing Party, all such attorneys' fees and costs shall be included in such judgment. Any arbitration shall be considered a judicial action for the purposes of this paragraph.

16. Resort Accommodations. From time to time, and subject to availability, User shall make accommodations at the Resort available to visiting representatives of BCSC at the best available corporate rate then offered by the Resort. BCSC's rights under this Paragraph shall be strictly limited to the use of accommodations for business purposes.

17. Amendments and Waiver of Conditions. No waiver by either Party of any breach of this Agreement by the other Party shall be construed as a waiver of any preceding or succeeding breach. This Agreement may be amended only in writing and may not be amended or modified by any part performance, reliance or course of dealing.

18. Additional Acts. The Parties agree to execute promptly any other documents and to perform promptly any other acts as may be reasonably required to effectuate the purposes and intent of this Agreement.

19. Successors and Assigns. This Agreement shall be binding upon and inure to the benefit of the successors and assigns of the Parties. This Agreement, together with all rights, obligations, duties and privileges arising hereunder, may be assigned by either Party without the consent of the other Party. If either Party assigns its interest hereunder, then such assignment shall

be set forth in a written document executed by the assignor and assignee, which document shall contain an express assumption by the assignee of all obligations of the assignor under this Agreement. The foregoing notwithstanding, the failure of an assignee or other successor in interest to execute and deliver such written document shall not terminate or otherwise limit the rights of the non-assigning Party hereunder.

20. Governing Law; Severability. This Agreement shall be governed by, construed and enforced in accordance with the laws of the State of Arizona. If a court or governmental agency with jurisdiction determines that any provision of this Agreement is unenforceable, illegal or contrary to any applicable law, regulation, regulatory order, or tariff, then such provision shall be severed from this Agreement. In such case, the remainder of this Agreement shall remain in effect if both Parties can legally, practicably, and commercially continue without the severed provision.

21. Construction. The terms and provisions of this Agreement represent the results of negotiations between BCSC and User, neither of which have acted under any duress or compulsion, whether legal, economic or otherwise. Each Party has had the full opportunity to review and understand the legal consequences of this Agreement. Consequently, the terms and provisions of this Agreement should be interpreted and construed in accordance with their usual and customary meaning, and BCSC and User each waive the application of any rule of law providing that ambiguous or conflicting terms or provisions are to be interpreted or construed against the Party whose attorney prepared this Agreement.

22. Integration. The terms of this Agreement supersede all prior and contemporaneous oral or written agreements and understandings of BCSC and User with respect to its subject matter, all of which will be deemed to be merged into this Agreement. This Agreement is a final and complete integration of the understandings of BCSC and User with respect to the subject matter hereof. If there is any specific and direct conflict between, or any ambiguity resulting from, the

and provisions of this Agreement and the terms and provisions of any document, instrument, or other agreement executed in connection with or furtherance of this Agreement, the term, document, instrument, letter or other agreement will be interpreted in a manner consistent with the general purpose and intent of this Agreement.

22 Headings and Captions. The headings and captions of this Agreement are for information only and are not intended to limit or define the meaning of any provision of this Agreement.

23 Counterparts. This Agreement may be executed in any number of counterparts, each of which when executed and delivered, shall be deemed an original, but all of which when taken together shall constitute one binding contract and instrument.

IN WITNESS WHEREOF, BOULDERS CAREFREE SEWER COMPANY and BOULDERS JOINT VENTURE, have caused this Agreement to be executed on their behalf by their authorized representatives as of the day and year first above written.

BOULDERS CAREFREE SEWER  
CORPORATION, an Arizona corporation

By: 

Its: TREVOR T. HILL  
PRESIDENT

BOULDERS JOINT VENTURE,  
an Arizona general partnership

By: PAH GP, INC.  
A Delaware corporation  
Its: general partner

By: 

Fred J. Kleisner, President

John R. Bahlmann, Vice President

## **ATTACHMENT “B”**

1 **BEFORE THE ARIZONA CORPORATION COMMISSION**

2 **COMMISSIONERS**

Arizona Corporation Commission

**DOCKETED**

3 JEFF HATCH-MILLER, Chairman  
4 WILLIAM A. MUNDELL  
5 MIKE GLEASON  
6 KRISTIN K. MAYES  
7 BARRY WONG

DEC - 5 2006

DOCKETED BY

nr

8 IN THE MATTER OF THE APPLICATION OF  
9 BLACK MOUNTAIN SEWER CORPORATION,  
10 AN ARIZONA CORPORATION, FOR A  
11 DETERMINATION OF THE FAIR VALUE OF ITS  
12 UTILITY PLANT AND PROPERTY AND FOR  
13 INCREASES IN ITS RATES AND CHARGES FOR  
14 UTILITY SERVICE BASED THEREON.

DOCKET NO. SW-02361A-05-0657

DECISION NO. 69164

**OPINION AND ORDER**

15 DATE OF HEARING:

June 7, 8, 9, and 20, 2006

16 PLACE OF HEARING:

Phoenix, Arizona

17 ADMINISTRATIVE LAW JUDGE:

Dwight D. Nodes

18 APPEARANCES:

Jay Shapiro, FENNEMORE CRAIG, P.C., on  
behalf of Black Mountain Sewer Corporation;

Daniel Pozefsky, on behalf of the Residential  
Utility Consumer Office;

David W. Garbarino, MOHR, HACKETT,  
PEDERSON, BLAKLEY & RANDOLPH, P.C.,  
on behalf of Intervenor Town of Carefree;

Robert Williams, on behalf of Intervenor  
Boulders Homeowners Association; and

Keith Layton, Staff Attorney, Legal Division, on  
behalf of the Utilities Division of the Arizona  
Corporation Commission.

22 **BY THE COMMISSION:**

23 On September 16, 2005, Black Mountain Sewer Corporation ("BMSC" or "Company") filed  
24 an application with the Arizona Corporation Commission ("Commission") for a rate increase. BMSC  
25 currently provides wastewater service to approximately 1,957 customers in and around Carefree,  
26 Arizona, 1,836 of which are residential customers and 121 are commercial (Ex. A-4, at 3).

27 BMSC's current rates and charges were authorized in Decision No. 59944 (December 26,  
28

BH-A-1

1 the third day of the hearing, it did not have any specific ideas of how the proposal may be  
2 accomplished. The Administrative Law Judge therefore directed Staff to file a written description of  
3 its alternative recommendation prior to the close of the hearing (Tr. 624).

4 Staff decided to withdraw its alternative recommendation and, on the final day of the hearing,  
5 a discussion occurred regarding the issue (Tr. 653-674). In general terms, RUCO, the Town and the  
6 Boulders HOA were interested in pursuing the Staff alternative. However, the Company objected to  
7 Staff's "eleventh hour" proposal and to the attempt by the Town and the HOA to resurrect the issue  
8 after it was withdrawn by Staff (*Id.*). The Company also raised the issue of whether the hook-up fee  
9 funds could legally be used for the purposes suggested in Staff's alternative. In any event, the  
10 Company represented that financial resources to make necessary system improvements are not  
11 lacking (Tr. 470).

12 Given Staff's withdrawal of its alternative recommendation, the hearing concluded without  
13 further consideration of the proposal.

#### 14 OTHER ISSUES

##### 15 Odor Issues

16 The most contentious issue in this proceeding involves claims made by a number of the  
17 Company's customers, as well as the Town of Carefree and the Boulders HOA, that the BMSC  
18 system emits significant odors. For the Town and the HOA, the odor problem was the only issue  
19 pursued. In addition to Mr. Williams on behalf of the Boulders HOA, public comment was given at  
20 the hearing by seven customers, each of whom described various experiences regarding odors at their  
21 properties due to the BMSC wastewater system (Tr. 30-80). In addition, a number of other customers  
22 submitted written comments or contacted the Commission's Consumer Services Division to register  
23 complaints regarding odors and/or the Company's proposed rate increase.

24 In response to the odor complaints, the Company initially took the position that any odor  
25 problems that may exist were not related to the BMSC system (Ex. A-6, at 2). In its rejoinder  
26 testimony, the Company's witness indicated that BMSC does not have an odor problem, "it has an  
27 odor complaint problem" (Ex. A-7, at 1). In opening statements, the Company's counsel reiterated  
28 BMSC's position that "we don't have a problem with odors; we have a problem with odor

1 complaints" (Tr. 15). During cross-examination, the Company's position appeared to soften as  
2 evidenced by the testimony given by Robert Dodds, APIF's director of operations and president of  
3 several of Algonquin's operating companies. Although Mr. Dodds was hesitant to commit unlimited  
4 resources to resolve the odor issues, he conceded that "there is an issue [and] obviously customers are  
5 smelling odors" (Tr. 482). However, in its initial post-hearing brief the Company appeared to move  
6 closer to its pre-hearing position, arguing that it is not possible to set a standard that would satisfy  
7 everyone, "[n]or is it possible to eliminate odors from a wastewater collection and treatment system"  
8 (BMSC Closing Brief, at 4). In response to arguments by the Town and the HOA that rate relief  
9 should be delayed until the odor issues are resolved, or that conditions should be imposed in  
10 conjunction with any rate increase granted in this case, the Company argues that the Commission  
11 should defer to the Maricopa County Environmental Services Department ("MCESD") which has  
12 determined that the Company meets the applicable odor control standards (*Id.* at 5).

13 Cause of Odors

14 Based on the public comments received, as well as the sworn testimony presented by various  
15 witnesses, there appears to be general agreement that the odor problems reported by customers stem  
16 from two separate sources, the CIE Lift Station and the wastewater line that flows under Boulder  
17 Drive in the Boulders subdivision.

18 CIE Lift Station

19 During prior updates to the wastewater system by BMSC's predecessor, all but one of the  
20 older lift stations (CIE lift station) was replaced. Operational problems at the CIE lift station have  
21 caused frequent odor issues and have required the Company to pump raw sewage from the site into  
22 trucks, which then deposit the sewage into other locations in the system. The Town's witness, Stan  
23 Francom stated that the CIE lift station should be replaced or bypassed because of regular  
24 breakdowns at the facility, and the inability to continue patching the lift station to keep it operational  
25 (Tr. 292, 334). An engineering report commissioned by the Town ("Carter Burgess Report")  
26 recommended replacing the CIE Lift Station due to operational problems (Ex. T-3, Ex. A., at 14).

27 BMSC witness Dodds also recognized the problems associated with the CIE Lift Station and  
28 indicated that the Company was studying ways to bypass or eliminate the facility (Tr. 466-467). The

1 Company attached to its initial Closing Brief an agreement dated August 9, 2006 between Algonquin  
2 and an engineering company to eliminate and bypass the CIE Lift Station (BMSC Closing Brief, Ex.  
3 2).

4 Given the Company's decision to eliminate the CIE Lift Station, that particular source of  
5 odors should be eliminated in the near future. The Company should notify the Commission and all  
6 other parties, within 30 days of the effective date of this Decision, as to the status of the CIE Lift  
7 Station project and projected completion date. The project should be completed within 180 days of  
8 the effective date of this Decision unless an extension is granted upon an appropriate timely request.

9 Boulders Community

10 The more complicated odor issue involves ongoing complaints by residents in the Boulders  
11 subdivision, especially along Boulders Drive where the sewer line flows from the CIE Lift Station to  
12 the Boulders wastewater treatment plant ("Boulders WWTP" or "WWTP"). According to Carefree  
13 witness Francom, the odors in the Boulders community are attributable to two problems: the long  
14 retention time that sewage sits in the Boulders line, thereby allowing the sewage to become septic  
15 (Tr. 283-285); and "positive pressure" between the CIE Lift Station and the Boulders WWTP due to  
16 the fact that the lines between the lift station and discharge manholes in the Boulders community are  
17 pressurized, but are gravity lines from the Boulders manholes to the WWTP (*Id.*). Mr. Francom  
18 explained that, once sewage is released suddenly into the Boulders discharge manholes, turbulence is  
19 created because the sewage displaces gasses within the system thereby pushing odors out into the  
20 community through any gaps, such as unsealed manhole covers or residential vent stacks (*Id.* at 286).

21 The Town asserts that Mr. Francom's analysis is confirmed by an engineering study by Lamb  
22 Technical Services, Inc. ("LTS Report"), which was commissioned by BMSC (Ex. A-6, Ex. 1,  
23 Attach. F). The LTS Report indicated that hydrogen sulfide concentrations are "extremely high" at  
24 the locations where the force mains discharge into the gravity lines upstream from the WWTP, and  
25 those locations "had positive pressures that tend to drive the odors and hydrogen sulfide  
26 concentrations out through the manhole cover pickholes" (*Id.*). The LTS Report noted that the  
27 Company's addition of the chemical treatment Thioguard in the Boulders area was partially  
28 successful in reducing hydrogen sulfide concentrations. However, LTS indicated that even with



1 those reductions the odors being driven out of residential vent stacks were still significant, and a  
2 redesign at the Boulder/Quartz discharge location "is recommended if turbulence could be reduced"  
3 (*Id.* at 5). The LTS Report stated that "[e]ven with reduced concentrations due to less turbulence a  
4 fan generating negative pressures will still most likely be needed at the Quartz and Boulder Drive  
5 location to prevent odors from being forced out the local vent stacks" (*Id.*).

6 Mr. Francom testified that there were two possible solutions to the Boulders odor problems:  
7 replacement of the gravity flow lines with pressure lines all the way to the Boulders WWTP; or  
8 installation of fans and carbon filters to create a negative pressure filtration system within the sewer  
9 lines between the discharge manholes and the WWTP (Tr. 334-335). Mr. Francom pointed out that  
10 the Town offered to install a temporary fan system to test the effectiveness of that method of odor  
11 remediation, but the offer was previously rejected by the Company on the basis that no odor problems  
12 existed (Tr. 315-318).

13 BMSC contends that it takes the odor complaints seriously and has been taking reasonable  
14 steps to address those complaints. The Company states that AWRA has invested more than \$1.4  
15 million on system improvements, much of which was designed to address odor issues (Ex. A-4, at 4).  
16 The Company argues that the standards suggested by the Town and the HOA for resolving the odor  
17 issues are too vague, because they would presumably require every customer to be totally satisfied,  
18 possibly well in excess of applicable government standards. BMSC argues that the public comment  
19 relied upon by the Town and HOA is not evidence in this proceeding, and the Company points out  
20 that it has never been found to be in violation of MCESD odor regulations (Tr. 322-323, 354, 620).  
21 The Company asserts that it would be unfair for the Commission to impose additional requirements,  
22 especially when such requirements may be beyond the Commission's jurisdiction. The Company  
23 claims that it has already addressed the odor problems by starting to remove the CIE Lift Station, and  
24 that it is willing to commence "yet another engineering study to evaluate allegations of continuing  
25 odors from facilities located within Boulders Drive" (BMSC Reply Brief, at 6). However, BMSC  
26 argues that ordering the specific steps recommended by the Town and HOA is "not related to  
27 ratemaking, and in the absence of any evidence that BMSC's operations violate the governing  
28 standards, would constitute improper interference with management of the utility" (*Id.*).

1       The Town and the Boulders HOA cite to several statutes that they argue give the Commission  
2 authority to impose remedial measures in cases such as this. Pursuant to A.R.S. §40-361(B), the  
3 intervenors argue that BMSC is obligated to "furnish and maintain such service, equipment and  
4 facilities as will promote the safety, health, comfort and convenience of its patrons...." They also  
5 contend that, under A.R.S. §40-334(B), BMSC may not "maintain any unreasonable difference as to  
6 ... service, facilities or in any other respect, either between localities...." The Town argues that this  
7 provision is applicable because customers in different areas of the BMSC service territory are  
8 affected by odors disproportionately. The intervenors further claim that Maricopa County regulations  
9 prohibit wastewater treatment facilities from producing air pollution that unreasonably interferes with  
10 property owners' enjoyment of life or property.

11       The Town claims that its recommendations are not vague because they propose specific  
12 remedies for resolving the odor issues raised in this proceeding. Therefore, Carefree requests that a  
13 condition be placed on any rate increase granted to BMSC requiring the Company to either replace  
14 the gravity line discussed above with pressure lines and/or install fans and carbon filters to create a  
15 negative filtration system between the Boulders discharge manhole and the Boulders WWTP. The  
16 HOA also argues that any rate increase granted in this case should be conditioned on BMSC being  
17 required to undertake an audit of the Company's sewer system; if the hook-up fee refund plan is  
18 rejected, all funds derived from the rate increase should be escrowed and used only for system  
19 improvements; an independent audit of BMSC's management structure should be conducted; the  
20 \$833,000 in hook-up fees should be used to fix the odor problems identified in this case; the Town's  
21 grease trap ordinance inspection and compliance reports should be monitored and publicized; and an  
22 expedited hearing should be conducted if BMSC fails to comply with the proposed conditions.

### 23       Resolution

24       We believe the evidentiary record in this case amply supports the appropriateness of, and the  
25 need for, imposition of odor remediation requirements as a condition of granting the rate relief  
26 approved herein. We turn first to the evidentiary standard for dealing with public comment since that  
27 issue was raised by the Company in its post-hearing Brief. Although we agree with BMSC that  
28 unsworn public comments made by ratepayers are not treated as evidence in a strict sense, we believe

1 ratepayer input is important to consider as an indication of how customers view the operations of a  
2 regulated utility company. For example, it may not be appropriate to rely solely on unsubstantiated  
3 claims made in public comments, because such comments are not subject to cross-examination.  
4 However, if corroborating sworn testimony or documentary evidence is presented in the course of the  
5 hearing, it is entirely appropriate to treat the public comments as an indicator of customer perception  
6 and experience in dealing with regulated monopoly utility companies. Indeed, such comments are  
7 invaluable for the Commission to understand both positive and negative experiences of customers,  
8 especially since those customers have no choice but to take service from the utility holding an  
9 exclusive Certificate to provide service.

10 We disagree with BMSC that the intervenor proposals are impossibly vague and would  
11 impose an undue compliance burden on the Company. As the Town points out, at least one of its  
12 proposed remedies for reducing odors in the Boulders subdivision was cited in both the Carter  
13 Burgess Report and LTS Report. The evidence in the record suggests that, despite the Company's  
14 attempts to solve the odor problems in that area through the introduction of Thioguard, there is an  
15 ongoing problem that cannot be solved by chemical injections alone. In addition to replacement of  
16 the CIE Lift Station, the prior engineering studies appear to have pinpointed not only the remaining  
17 cause of the odor problems (*i.e.*, pumping of sewage into the Boulders discharge manhole), but a  
18 possible solution (*i.e.*, fans to create negative pressure in the line leading from the Boulders manhole  
19 to the WWTP). Mr. Francom indicated that another solution may be the installation of a pressurized  
20 line to the WWTP, to replace the existing gravity line. As such, it hardly requires speculation to  
21 address the source of, and the solution for, the odor issues in the Boulders community. Rather, there  
22 is ample record evidence to support the conclusion that the Company should take action consistent  
23 with the prior engineering reports, as well as the credible testimony presented by the Town's witness,  
24 in order to remedy the odor problems discussed herein.

25 We are not persuaded by the Company's arguments that the Commission is without authority  
26 to take action to protect the public health and welfare of customers served by utilities under its  
27 jurisdiction. With respect to a public service corporation's adequacy of service, A.R.S. §40-321(A)  
28 states:

1 When the commission finds that the equipment, appliances, facilities or  
2 service of any public service corporation, or the methods of manufacture,  
3 distribution, transmission, storage or supply employed by it are unjust,  
4 unreasonable, unsafe, improper, inadequate or insufficient, the  
5 commission shall determine what is just, reasonable, safe, proper,  
6 adequate or sufficient, and shall enforce its determination by order or  
7 regulation.

8 As set forth in A.R.S. §40-331(A):

9 When the Commission finds that additions or improvements to or changes  
10 in the existing plant or physical property of a public service corporation  
11 ought reasonably to be made, or that a new structure or structures should  
12 be erected, to promote the security or convenience of its employees or the  
13 public, the commission shall make and serve an order directing that such  
14 changes be made or such structure be erected in the manner and within the  
15 time specified in the order. If the commission orders erection of a new  
16 structure, it may also fix the site thereof.

17 In addition, A.R.S. §40-361(B) provides as follows:

18 Every public service corporation shall furnish and maintain such service,  
19 equipment and facilities as will promote the safety, health, comfort and  
20 convenience of its patrons, employees and the public, and as will be in all  
21 respects adequate, efficient and reasonable.

22 As these statutes make abundantly clear, the Commission has the authority and the duty to  
23 protect the health, safety and welfare of a public service corporation's customers. And, contrary to  
24 BMSC's "micromanagement" arguments, the law just as clearly states that in order to protect the  
25 security or convenience of the public, the Commission may specify not only the type of facilities that  
26 are required, but the timeframe in which the facilities must be constructed.

27 A.R.S. §40-202(A), provides additional supervisory authority to the Commission for  
28 regulation of public service corporations<sup>12</sup>. The authority granted to the Commission under these  
statutes, as well as the Commission's constitutional powers pursuant to Article 15, §3 of the Arizona  
Constitution, was discussed in *Arizona Corp. Comm'n v. Palm Springs Utility Co., Inc.*, 24 Ariz.  
App. 124, 128, 536 P.2d 245, 249 (App. 1975). In that case, the court held that "the regulatory  
powers of the Commission are not limited to making orders respecting the health and safety, but also

<sup>12</sup> A.R.S. §40-202(A), provides in relevant part: "The commission may supervise and regulate every public service corporation in the state and do all things, whether specifically designated in this title or in addition thereto, necessary and convenient in the exercise of that power and jurisdiction."

1 include the power to make orders respecting comfort, convenience, adequacy and reasonableness of  
2 service....” (*Id.*). Given our determination that our constitutional and statutory powers provide the  
3 requisite authority to require actions by the Company to resolve the odor problems cited herein, we  
4 need not decide whether the Maricopa County rules and regulations cited by the intervenors are  
5 implicated by the facts presented in this case.

6 Having determined that the record supports a finding that odor problems exist on the BMSC  
7 system, and that we have legal authority to craft a remedy for those problems, we turn next to the  
8 appropriate directives that should be given to the Company as a condition of our approval of the rate  
9 increase discussed hereinabove. We find that the Boulders odor problems should be addressed by the  
10 Company’s adoption of one of the two solutions suggested by Mr. Francom. As he explained on the  
11 record, the odors being experienced by members of that community may be solved by implementing  
12 a pressurized line to replace the gravity line that currently exists between the Boulders discharge  
13 manhole and the Boulders WWTP, or by installing fans and carbon filters to create a negative  
14 pressure filtration system between the Boulders discharge manhole and the Boulders WWTP<sup>13</sup>.

15 The implementation of these remedies should be completed within 180 days of the effective  
16 date of this Decision although, for good cause shown and with the agreement of all other parties to  
17 this proceeding, the timeline may be extended by the Commission upon timely receipt of a request for  
18 extension of time. We also wish to make clear that failure by BMSC to comply with this order, or to  
19 otherwise continue to operate its system in a manner that fails to reasonably mitigate odors affecting  
20 customer residences and properties, may result in penalties or other action deemed necessary by the  
21 Commission to enforce this Decision.

22 By imposing this requirement, we wish to make clear that we are not attempting to manage  
23 the Company’s affairs. However, based on the record, we believe action needs to be taken to advance  
24 a solution that will enable all customers on the BMSC system to enjoy fully their property without  
25 enduring offensive odors.

26 \* \* \* \* \*

27  
28 <sup>13</sup> With the mutual agreement of all other parties to this proceeding, an alternative remedy may be employed to  
accomplish the desired goal of odor remediation in the Boulders community.

1 Having considered the entire record herein and being fully advised in the premises, the  
2 Commission finds, concludes, and orders that:

3 **FINDINGS OF FACT**

4 1. On September 16, 2005, BMSC filed an application with the Commission for an  
5 increase in rates.

6 2. On October 14, 2005, the Commission's Utilities Division Staff filed a Letter of  
7 Insufficiency.

8 3. Following an agreement between the Company and Staff regarding the submission of  
9 information, Staff issued a Letter of Sufficiency on November 1, 2005, and classified BMSC as a  
10 Class B utility.

11 4. By Procedural Order issued November 2, 2005, procedural timeframes were  
12 established and a hearing was scheduled to commence on June 7, 2006.

13 5. Intervention was granted to RUCO, the Town of Carefree, the Boulders HOA, and  
14 M.M. Schirtzinger.

15 6. On December 30, 2005, BMSC filed a "simplified cost of service study" as requested  
16 by Staff.

17 7. On January 24, 2006, BMSC filed a Certification of Publication and Proof of Mailing,  
18 attesting to compliance with the notice requirements set forth in the November 2, 2005 Procedural  
19 Order.

20 8. With its application, BMSC filed the Direct Testimony of Michael Weber and Thomas  
21 Bourassa, and, on March 9, 2006, Staff filed the Direct Testimony of Crystal Brown, Marlin Scott,  
22 Jr., and Pedro Chaves; RUCO filed the Direct Testimony of William Rigsby and Marylee Diaz  
23 Cortez; and Carefree filed Affidavits of Stan Francom, Jonathon Pearson, and Jason Bethke, as well  
24 as several attachments.

25 9. On April 6, 2006, BMSC filed the Rebuttal Testimony of Michael Weber, Joel Wade,  
26 and Thomas Bourassa. On May 4, 2006, Staff filed the Surrebuttal Testimony of Marlin Scott, Jr.,  
27 and Pedro Chaves; RUCO filed the Surrebuttal Testimony of William Rigsby and Marylee Diaz  
28 Cortez; and Carefree filed the Surrebuttal Testimony of Stan Francom and Jonathon Pearson. On

1 regarding the reasonableness of the Algonquin affiliate structure. In future cases involving the  
2 Algonquin companies, the Commission will scrutinize all affiliate salaries, expenses and billings.

3 23. The record supports a finding that customers should be refunded \$833,367 for hook-up  
4 fees that were used to purchase land and that have not been expended. The refunds should be  
5 distributed in the manner proposed by the Company, on a per customer basis irrespective of customer  
6 class. The rates granted in this Decision should not go into effect until the refunds have been  
7 distributed.

8 24. The record supports a finding that BMSC should, within 30 days, notify the  
9 Commission and all other parties as to the status of the CIE Lift Station project and projected  
10 completion date.

11 25. The record supports a finding that odor problems exist on BMSC's system, and that  
12 the steps taken by the Company to date have not been sufficient to resolve the problems. BMSC  
13 should therefore be required to pursue one of the remedies proposed by the Town of Carefree in order  
14 to mitigate the odor problems that currently exist in the Boulders community. The implementation of  
15 the remedies should be completed within 180 days from the effective date of this Decision.

16 **CONCLUSIONS OF LAW**

17 1. BMSC is a public service corporation within the meaning of Article XV of the  
18 Arizona Constitution and A.R.S. §§40-250, 40-251, 40-367, 40-202, 40-321, 40-331, and 40-361.

19 2. The Commission has jurisdiction over BMSC and the subject matter contained in the  
20 Company's rate application.

21 3. Pursuant to A.R.S. §§40-202(A), 40-321(A), 40-331(A), 40-361(B), and the authority  
22 under Article 15 of the Arizona Constitution, the Commission has jurisdiction to impose  
23 requirements for public service corporations to improve and repair facilities necessary to protect the  
24 health and safety of the public, and provide for the comfort and convenience of customers.

25 4. The rates, charges and conditions of service established herein are just and reasonable  
26 and in the public interest.

27 **ORDER**

28 IT IS THEREFORE ORDERED that Black Mountain Sewer Corporation is hereby authorized

1 IT IS FURTHER ORDERED that Black Mountain Sewer Corporation shall pursue one of the  
 2 remedies proposed by the Town of Carefree in order to mitigate the odor problems that currently  
 3 exist in the Boulders community, and notify the Commission and all parties, within 90 days,  
 4 regarding the option chosen through a filing in this docket. The implementation of the remedies shall  
 5 be completed within 180 days from the effective date of this Decision unless an extension is granted  
 6 upon an appropriate request. The Company shall file as a compliance item in this docket, notification  
 7 of completion of the Boulders community odor mitigation project, within 30 days of completion of  
 8 the project.

9 IT IS FURTHER ORDERED that this Decision shall become effective immediately.

10 BY ORDER OF THE ARIZONA CORPORATION COMMISSION.

11   
 12 CHAIRMAN

13   
 14 COMMISSIONER

15   
 16 COMMISSIONER

17   
 18 COMMISSIONER

19   
 20 COMMISSIONER

21 IN WITNESS WHEREOF, I, BRIAN C. McNEIL, Executive  
 22 Director of the Arizona Corporation Commission, have  
 23 hereunto set my hand and caused the official seal of the  
 24 Commission to be affixed at the Capitol, in the City of Phoenix,  
 25 this 5<sup>th</sup> day of Dec., 2006.

26   
 27 BRIAN C. McNEIL  
 28 EXECUTIVE DIRECTOR

29 DISSENT \_\_\_\_\_

30 DISSENT \_\_\_\_\_



## **ATTACHMENT “C”**

## WASTEWATER TREATMENT PLANT CLOSURE AGREEMENT

This WASTEWATER TREATMENT PLANT CLOSURE AGREEMENT (this "Agreement") is made this 17<sup>th</sup> day of September 2009, by and between the BOULDERS HOME OWNERS ASSOCIATION, a non-profit Arizona corporation ("BHOA") and BLACK MOUNTAIN SEWER CORPORATION, an Arizona public service corporation ("BMSC") (individually, a "Party" and collectively, "Parties"), for the purposes and consideration set forth hereinafter.

### RECITALS

A. BMSC is a public service corporation as defined in Article 15, Section 2 of the Arizona Constitution. BMSC owns and operates certain wastewater collection, transmission and treatment facilities and holds a certificate of convenience and necessity granted by the Arizona Corporation Commission (the "ACC") authorizing BMSC to provide sewer utility service within portions of the Town of Carefree and the City of Scottsdale.

B. BHOA is an association of 332 home and property owners in the northern portion of the area known as the Boulders community in North Scottsdale and Carefree, Arizona. A map depicting the general location of the Boulders community is attached hereto as Exhibit A to this Agreement. The Boulders community also includes the Boulders Resort and Club (the "Resort"). The Resort is located in north Scottsdale and includes a hotel, clubhouse, pool, tennis courts, various landscaped areas, two 18-hole championship golf courses, and numerous residential units. BHOA owns and controls the common areas and BHOA and its members are customers of BMSC, as the entire Boulders community is located within BMSC's certificated service territory.

D. At the present time, BMSC operates a single wastewater treatment plant known as the Boulders East Plant (the "Plant") within the Resort. The Plant currently has a permitted capacity of 120,000 gallons per day ("gpd") and a maximum treatment capacity of 160,000 gpd. BMSC currently treats an average 120,000 gpd of wastewater and delivers all effluent from the Plant to the Resort pursuant to an Effluent Delivery Agreement, dated March 2001. The remainder of BMSC's wastewater is delivered to the City of Scottsdale for treatment, pursuant to a Wastewater Treatment Agreement, dated April 1, 1996 ("Scottsdale Agreement").

E. As required by ACC Decision No. 69164 (December 5, 2006), BMSC has made substantial improvements to its wastewater collection systems. These improvements have been successful in addressing odors from the Company's collection system. However, fugitive odors continue to be a problem at the Plant, as do intermittent noises and traffic from an assortment of trucks and related vehicles servicing the Plant due primarily to its location within the BHOA and in the immediate proximity of residential properties. Because these odors and noises remain largely within the Plant's normal operating parameters, the parties believe that the only viable remedy to remove all odors and noises/truck traffic from the surrounding community is closure of the Plant. This is true, despite the parties' agreement that the Plant is being operated by

BSX

BMSC in compliance with all applicable law and regulation, and that such utility property is a used and necessary asset of BMSC.

F. BHOA represents that the closure of the Plant is supported by the Boulders community, the Town of Carefree, and the City of Scottsdale, all of whom, in addition to BMSC's customers, have an interest in the closure of the Plant. Therefore, in order to pursue closure of the Plant, the Parties desire to enter into an agreement setting forth the terms and conditions under which BMSC will close the Plant and clarify each Party's rights and obligations with respect to that closure and the associated regulatory and ratemaking approvals.

NOW, THEREFORE, for good and valuable consideration the receipt and sufficiency of which are hereby acknowledged, the Parties covenant and hereby agree as follows:

### AGREEMENT


1. Incorporation of Recitals. Each of the recitals set forth above are hereby incorporated into this Agreement by this reference as if fully set forth herein.

2. Closure of the Plant. BMSC agrees to close the Plant subject to the terms and conditions set forth hereinafter. As used herein, the terms "closure" and "close" in reference to the Plant shall mean the termination of the wastewater treatment operations at the Plant, removal of the physical structure of the Plant and the associated equipment that is not necessary for the continued operation of the wastewater collection and transportation systems and remediation and restoration of the Plant's associated property as required by applicable law and regulation.

a. Conditions Precedent to Plant Closure. BMSC agrees to commence the closure of the Plant if the following conditions are satisfied:

i. Downstream Collection System Line Capacity. The downstream collection system line from the Plant to the City of Scottsdale must have sufficient capacity to support an additional 120,000 gpd flow of wastewater. If engineering evaluations conducted by BMSC or its agents determine that the downstream collection system line lacks sufficient capacity to support the extra flow, BMSC agrees to upgrade the system to provide sufficient capacity for additional flow if it determines, in its discretion and in consultation with BHOA, such an upgrade is not prohibitively expensive for BMSC and is in the best interests for BMSC and its ratepayers.

ii. Flow-through to the City of Scottsdale. Engineering evaluations conducted by BMSC or its agents must demonstrate that the Plant's intake and outflow lines can be connected to permit flow-through of wastewater to the City of Scottsdale's wastewater treatment system in the same or similar manner as BMSC currently delivers flows from its customers to the City of Scottsdale system under the Scottsdale Agreement. BMSC agrees to modify the Plant's system to permit such flow-through if it determines, in its discretion and in consultation with BHOA, such an upgrade is not prohibitively expensive for BMSC and is in the best interests for BMSC and its ratepayers.



iii. Wastewater Treatment Agreement with the City of Scottsdale. BMSC must successfully negotiate the purchase of 120,000 gpd of additional wastewater treatment capacity to treat the flows currently being treated at that Plant. In addition, BMSC must sign an amendment to the Scottsdale Agreement that (1) extends BMSC's right to purchase additional capacity beyond December 21, 2016; (2) states that BMSC's right to capacity shall survive the termination of the Scottsdale Agreement; (3) states that the City of Scottsdale cannot terminate the Scottsdale Agreement if BMSC closes the Plant; and (4) provides BMSC the long-term right to purchase additional capacity at market rates.

iv. Effluent Agreement with the Resort. BMSC currently has an agreement with the Resort which requires BMSC to deliver all effluent generated at the Plant to the Resort through March 2021. In the agreement, BMSC covenanted to continue to operate the Plant and to not reduce the amount of effluent produced by the Plant. BMSC must sign an agreement with the Resort whereby the Resort agrees to allow the termination of the Effluent Agreement at no or limited cost to BMSC.

v. Approval of Plant Closure. BMSC must seek and obtain all the necessary local, county, state, and/or federal approvals for the closure of the Plant.

vi. ACC Approval of Cost Recovery for Plant Closure. ACC must approve a cost recovery mechanism that permits BMSC to recover a return on and of the capital costs of closure, which costs include, without limitation, the costs of procuring additional capacity from the City of Scottsdale, the costs of engineering and other analyses necessary to complete the closure, any system upgrades required as a result of the closure and/or the delivery of the flows previously treated at the Plant to the City of Scottsdale. BMSC must also be authorized recovery of any reasonable costs of reaching agreement with the BHOA, the City of Scottsdale and the Resort as required to fulfill the terms of this Agreement, including, without limitation, the costs of obtaining all necessary approval from the ACC, including rate case expense. BMSC shall have no obligation under this Agreement if the ACC does not approve such cost recovery mechanism as acceptable to BMSC in its sole discretion.

b. Termination of Operations at the Plant. BMSC agrees to use all commercially reasonable efforts to complete termination of its operation of the Plant within 15 months of the satisfaction of conditions listed in Sections 2(a) (i) – (vi), subject to government approvals and the terms and conditions set forth hereinafter.

c. Removal of Plant Structure and Associated Equipment. After terminating its operations, BMSC agrees to remove the Plant's physical structure from the Plant Property. The "Plant Property" includes the 1.03 acres of the current Plant site. BMSC agrees to remove any associated equipment or structures from the property that are not necessary for the continued operation of its wastewater collection or transportation systems.

d. Remediation of the Plant Property. BMSC agrees to be responsible for the proper management, handling, transportation, storage and disposal of any hazardous substances generated by BMSC's activities on the Plant Property. BMSC is responsible for remediating the hazardous substances directly generated by its activities on the Plant Property to the level required by applicable laws, if such remediation is required by an applicable law. The term

"Hazardous Substances" shall mean any substance, material, pollutant, contaminant, or waste, whether solid, gaseous or liquid, that is infectious, toxic, hazardous, explosive, corrosive, flammable or radioactive, and that is regulated, defined, listed or included in any Applicable Laws, including, without limitation, asbestos, petroleum, petroleum or fuel additives, polychlorinated biphenyls, urea formaldehyde, or waste tires.

e. Restoration of the Plant Property. BMSC agrees to restore the surface and subsurface of the Plant Property to a safe and stable condition. Further, upon completing closure of the Plant structure, BMSC and its agents shall remove from the Plant Property all tools, excavated material, personal property, rubbish, waste and surplus materials in connection with the closure and/or previous operation of the Plant and leave the Plant property free and clear from all obstructions and hindrances until such time that residential structures may be constructed on the site.

3. Ownership of Plant Property. BMSC will have full and complete ownership of the Plant Property after the completion of the closure, remediation and restoration. Within 60 days of BMSC completing removal of the Plant's physical structure from the Plant Property, BHOA agrees to contribute or work with BMSC to enable transfer of the 0.2+ acres of land adjacent to the Plant to BMSC to enable development of the Plant Property. Thereafter, BMSC will determine, in its discretion, the best time to market the residential property so as to maximize its value, subject to local laws and rules applicable to development within the BHOA. BMSC further agrees to seek ratemaking treatment of such gain that would result in an equal sharing of the gain between BMSC's shareholders and ratepayers, and BHOA agrees to provide support for such ratemaking treatment of any gain of the Plant Property. Gain on sale shall be that amount over and above BMSC's basis in the Plant Property. The gain on sale shall exclude the proceeds from the 0.2+ acres "contributed" by BHOA. All proceeds from the sale of the 0.2 acres "contributed" by BHOA shall be allocated towards reducing the rate base and costs of the closure of the Plant

4. Costs of the Closure of the Plant. BMSC will be responsible for all costs related to the closure of the Plant, notwithstanding BHOA's contribution discussed in Paragraph 3.

5. Covenants.

- a. BMSC covenants and agrees to negotiate in good faith and with promptness the modifications to the agreements contemplated in Sections 2(a)(iii) and 2(a)(iv) above.
- b. BHOA covenants and agrees to lend assistance and support as requested by BMSC in relation to BMSC's efforts to close the Plant, including assisting and supporting BMSC as requested in relations to BMSC's efforts with the City of Scottsdale and the Resort. BHOA specifically covenants to assist and support BMSC, publicly and privately, in its efforts before the ACC to obtain recovery of its costs incurred under this Agreement, including rate case expense, as contemplated in Section 2.a.iv above. BHOA agrees and acknowledges that recovery of a return on and of the capital investments and the expenses incurred by BMSC and/or its parent company in reaching and

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obtaining the necessary approvals of the Agreement and thereafter closing the Plant will likely result in the need for higher utility rates by BMSC.

- c. Both Parties covenant and agree to not interfere with or cause an unreasonable delay in the removal of the Plant.

6. Risk and Indemnification. Subject to the limitations set out herein, BMSC hereby assumes any and all risks associated with the Plant's closure or other actions to be conducted by BMSC pursuant to this Agreement. BHOA shall not seek indemnification from BMSC for any and all claims, actions, costs, fees, expenses, damages, environmental investigation costs, obligations, penalties, fines, liabilities or other losses arising out of any breach or default in the performance of this Agreement by BHOA.

7. Force Majeure. Neither Party to this Agreement shall be liable to the other for failure, default or delay in performing any of its obligations hereunder, other than for the payment of money obligations specified herein, in case such failure, default or delay is caused by strikes or other labor problems, by forces of nature, unavoidable accident, fire, floods, acts of the public enemy, interference by civil authorities, passage of laws, orders of the court, unavailability of or delays in receipt of materials, supplies or equipment, or any other cause, whether of similar nature, not within the control of the Party affected and which, by the exercise of due diligence, such Party is unable to prevent. Should any of the foregoing occur, the Parties hereto agree to proceed with reasonable diligence to correct or eliminate the condition causing the force majeure and do what is reasonable and necessary so that each Party may perform its obligations under this Agreement.

8. Term of Agreement. This Agreement shall terminate when the Parties have performed all of their obligations under this Agreement, but no earlier than the time BMSC has obtained favorable ratemaking for the costs of the closure.

9. Termination of Agreement.

a. Termination for Breach. Either Party may initiate proceedings for termination of this Agreement in the event of a breach or anticipated breach of a material term or condition by the other Party. In such event, the Party contending that a breach has or will occur shall promptly provide notice thereof to the other Party, and shall initiate proceedings in accordance with Paragraph 12, below.

b. Failure of Conditions to Plant Closure. If any of the conditions listed in Paragraphs 2(a) (i) – (vi) are not satisfied, either Party may initiate proceedings for termination of this Agreement. In such event, the Party contending that a failure of a condition has or will occur shall promptly provide notice thereof to the other Party, and shall initiate proceedings in accordance with Paragraph 11, below.

10. Notices. Any notice required or permitted to be given hereunder shall be in writing and directed to the address set forth below for the Party to whom the notice is given and shall be deemed delivered (i) by personal delivery, on the date of delivery; (ii) by first class United States mail, three (3) business days after being mailed; or (iii) by Federal Express

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Corporation (or other reputable overnight delivery service), one (1) business day after being deposited into the custody of such service.

If to BMSC to: Greg Sorensen  
Black Mountain Sewer Corporation dba Liberty Water  
12725 W. Indian School Road, Suite D-101  
Avondale, AZ 85392

With a copy to: Jay L. Shapiro  
Fennemore Craig, P.C.  
3003 N. Central Avenue, Suite 2600  
Phoenix, AZ 85012

If to BHOA to: Ted Wojtasik  
Rossmar & Graham  
9362 E. Raintree Drive  
Scottsdale, AZ 85260

With a copy to: Scott Wakefield  
Ridenour, Hinton & Lewis  
201 N. Central Avenue, Suite 3300  
Phoenix, AZ 85004

Any Party may designate another address for notices under this Agreement by giving the other Party not less than thirty (30) days advance notice.

11. Dispute Resolution. The Parties agree to use good faith efforts to resolve, through negotiation, disputes arising under this Agreement. If the Parties are unable to resolve the dispute within sixty (60) days, a Party that still believes the dispute requires resolution may pursue mediation or arbitration or commence litigation in a court or other tribunal of appropriate jurisdiction.

12. Attorneys' Fees. In the event either Party hereto finds it necessary to employ legal counsel or to bring an action at law or any other proceeding against the other Party to enforce any of the terms, covenants or conditions hereof, the prevailing Party in such action or proceeding shall be paid its reasonable attorneys' fees and costs, and in the event any judgment is secured by such prevailing Party, all such attorneys' fees and costs shall be included in such judgment. Any arbitration shall be considered a proceeding for the purposes of this paragraph.

13. Amendments and Waiver of Conditions. No waiver by either Party of any breach of this Agreement by the other Party shall be construed as a waiver of any preceding or succeeding breach. This Agreement may be amended only in writing and may not be amended or modified by any part performance, reliance or course of dealing.

*BS*

14. Additional Acts. The Parties agree to execute promptly any other documents and to perform promptly any other acts as may be reasonably required to effectuate the purposes and intent of this Agreement. Each Party shall cooperate with and provide reasonable assistance to the other party to obtain all required approvals and consents necessary to effectuate and perform this Agreement.

15. Successors and Assigns. This Agreement shall be binding upon and inure to the benefit of the successors and assigns of the Parties. This Agreement, together with all rights, obligations, duties and privileges arising hereunder, may be assigned by either Party without the consent of the other Party. If either Party assigns its interest hereunder, then such assignment shall be set forth in a written document executed by the assignor and assignee, which document shall contain an express assumption by the assignee of all obligations of the assignor under this Agreement. The foregoing notwithstanding, the failure of an assignee or other successor in interest to execute and deliver such written document shall not terminate or otherwise limit the rights of the non-assigning Party hereunder.

16. Governing Law. This Agreement shall be governed by, construed and enforced in accordance with the laws of the State of Arizona.

17. Construction. The terms and provisions of this Agreement represent the results of negotiations between BMSC and BHOA, neither of which have acted under any duress or compulsion, whether legal, economic or otherwise. Each Party has had the full opportunity to review and understand the legal consequences of this Agreement. Consequently, the terms and provisions of this Agreement should be interpreted and construed in accordance with their usual and customary meaning, and BMSC and BHOA each waive the application of any rule of law providing that ambiguous or conflicting terms or provisions are to be interpreted or construed against the Party whose attorney prepared this Agreement. This Agreement represents the Parties' mutual desire to compromise and settle disputed issues. The acceptance by any Party of a specific element of this Agreement shall not be considered precedent for acceptance of that element in any other context. Nothing in this Agreement shall be construed as an admission by any Party as to the reasonableness or unreasonableness or lawfulness or unlawfulness of any position previously taken by any other Party. No Party is bound by any position asserted in negotiations, except as expressly stated in this Agreement. No Party shall offer evidence of conduct or statements made in the course of negotiating this Agreement before the Commission, any other regulatory agency, or any court. The invalidity of any provision of this Agreement shall in no way affect any other provision hereof.

18. Interpretation. The terms of this Agreement supersede all prior and contemporaneous oral or written agreements and understandings of BMSC and BHOA with respect to its subject matter, all of which will be deemed to be merged into this Agreement. This Agreement is a final and complete integration of the understandings of BMSC and BHOA and sets forth the entire agreement between the parties with respect to the subject matter hereof. If there is any specific and direct conflict between, or any ambiguity resulting from, the terms and provisions of this Agreement and the terms and provisions of any document, instrument, letter or other agreement executed in connection with or furtherance of this Agreement, the term, provision, document, instrument, letter or other agreement will be interpreted in a manner consistent with the general purpose and intent of this Agreement.

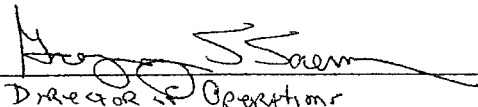
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19. Counterparts. This Agreement may be executed in two or more original or facsimile counterparts, each of which shall be deemed an original and all of which together shall constitute but one and the same instrument.

IN WITNESS WHEREOF, BMSC and BHOA have executed this Wastewater Treatment Plant Closure Agreement as of the date and year first written above.

BLACK MOUNTAIN SEWER CORPORATION  
An Arizona corporation.

By   
Its Director of Operations

BOULDERS HOME OWNERS ASSOCIATION  
A non-profit Arizona corporation

By \_\_\_\_\_  
Its \_\_\_\_\_

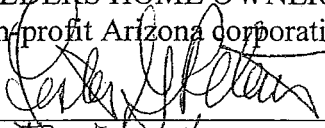
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BLACK MOUNTAIN SEWER CORPORATION  
An Arizona corporation.

By \_\_\_\_\_  
Its \_\_\_\_\_

BOULDERS HOME OWNERS ASSOCIATION  
A non-profit Arizona corporation

By   
Its President

## **ATTACHMENT “D”**

BEFORE THE ARIZONA CORPORATION CO..

COMMISSIONERS

Arizona Corporation Commission

**DOCKETED**

SEP -1 2010

KRISTIN K. MAYES, Chairman  
GARY PIERCE  
PAUL NEWMAN  
SANDRA D. KENNEDY  
BOB STUMP

DOCKETED BY

nr

IN THE MATTER OF THE APPLICATION OF  
BLACK MOUNTAIN SEWER CORPORATION,  
AN ARIZONA CORPORATION, FOR A  
DETERMINATION OF THE FAIR VALUE OF ITS  
UTILITY PLANT AND PROPERTY AND FOR  
INCREASES IN ITS RATES AND CHARGES FOR  
UTILITY SERVICE BASED THEREON.

DOCKET NO. SW-02361A-08-0609

DECISION NO. 71865

OPINION AND ORDER

DATES OF HEARING:

September 21, 2009 (Public Comment), November 11,  
2009 (Pre-Hearing Conference), November 18, 23, 24  
and 25, 2009.

PLACE OF HEARING:

Phoenix, Arizona

ADMINISTRATIVE LAW JUDGE:

Dwight D. Nodes

APPEARANCES:

Mr. Jay L. Shapiro, FENNEMORE CRAIG, P.C., on  
behalf of Black Mountain Sewer Corporation;

Ms. Michelle Wood, on behalf of the Residential Utility  
Consumer Office;

Mr. Scott S. Wakefield, RIDENOUR, HIENTON &  
LEWIS, P.L.L.C., on behalf of the Boulders  
Homeowners Association;

Mr. Thomas K. Chenal, SHERMAN & HOWARD,  
L.L.C., on behalf of the Town of Carefree;

Dr. Dennis Doelle, D.D.S., in propria persona;

Mr. M.M. Schirtzinger, in propria persona; and

Mr. Kevin O. Torrey, Staff Attorney, Legal Division, on  
behalf of the Utilities Division of the Arizona  
Corporation Commission.

|                               |       |
|-------------------------------|-------|
| Weighted Avg. Cost of Capital | 9.41% |
|-------------------------------|-------|

## VII. AUTHORIZED REVENUE INCREASE

Based on our findings herein, we determine that BMSC is entitled to a gross revenue increase of \$669,781.

|                                 |             |
|---------------------------------|-------------|
| Fair Value Rate Base            | \$3,606,767 |
| Adjusted Operating Income       | (62,846)    |
| Required Rate of Return         | 9.41%       |
| Required Operating Income       | 339,397     |
| Operating Income Deficiency     | 402,243     |
| Gross Revenue Conversion Factor | 1.6651      |
| Gross Revenue Increase          | \$669,781   |

## VIII. RATE DESIGN/OTHER ISSUES

### A. Surcharge Request for Closure of Boulders WWTP

In BMSC's last rate case, we identified the problem of system odors as "the most contentious issue in this proceeding." (Decision No. 69164, at 30.) Again in this case, the issue of odor control is the most important concern expressed by customers of BMSC as evidenced by the hundreds of public comments submitted in the docket, and the intervention of the BHOA to address the odor issue. In recognition of the concerns expressed by many of the Company's customers, BMSC entered into negotiations to find a remedy to the ongoing odor issues and a settlement agreement was ultimately executed by BMSC and BHOA. (BHOA Ex. 4, Ex. B.)

## 1. History of Boulders WWTP

As described in the testimony of the BHOA's president, Les Peterson, the BHOA is an association of 332 home and property owners located in the Boulders community, in the northern part of BMSC's service area in the Town of Carefree. The southern part of the Boulders community, which is located within the Scottsdale city limits, has a separate homeowners association, the Owners' Association of Boulders Scottsdale ("OABS"). (BHOA Ex. 1, at 1.)

According to Mr. Peterson, the Boulders WWTP was originally constructed in 1969 to serve homes within the Boulders community. (*Id.* at 2.) In 1980, BMSC's predecessor, Boulders Carefree Sewer Corporation ("Boulders Carefree"), acquired the sewer assets of Carefree Water Company, Inc. ("Carefree Water") and Boulders Carefree was granted a Certificate of Convenience and

1 Necessity ("CC&N"). (*Id.*; Decision No. 50544, January 3, 1980.) Decision No. 50544 indicated that  
2 although the Boulders WWTP was originally intended to serve only the Boulders Carefree  
3 development and golf course, by 1980 it was processing all the treated sewage in Carefree which, at  
4 that time, consisted of approximately 200 customers including 15 commercial users. (Decision No.  
5 50544, at 2.) That Decision stated that the WWTP was operating at its 120,000 gallons per day  
6 ("gpd") capacity, and Boulders Carefree was authorized to construct an additional "package plant" on  
7 the same site to add 60,000 gpd of capacity.<sup>18</sup>

8 Mr. Peterson testified that the Boulders WWTP remains in the same location where it was  
9 originally constructed, and residences were constructed in close proximity to the plant during a period  
10 of rapid expansion. He stated that the WWTP is located less than 100 feet from 3 homes, less than  
11 300 feet from 10 homes, less than 500 feet from 17 homes, and within 1,000 feet of 200 to 300  
12 homes, as well as the primary dining and conference facilities of the Boulders Resort. (BHOA Ex. 4,  
13 at 3-4.) Mr. Peterson claims that the rapid expansion caused severe financial problems for Boulders  
14 Carefree, and required several interim and permanent rate increases in 1981 (Decision No. 52585),  
15 1982 (Decision No. 53300), and 1985 (Decision No. 54537). He indicated that since 1989, flows in  
16 excess of the WWTP's 120,000 gpd capacity have been sent to Scottsdale for treatment, and currently  
17 only 20 percent of BMSC's total annual raw sewage is treated at the Boulders WWTP. (*Id.*)

18 In 1996, Boulders Carefree entered into a new Wastewater Treatment Agreement with  
19 Scottsdale ("Scottsdale Agreement") that permitted Boulders Carefree (and now BMSC) to purchase  
20 increments of capacity of up to 1,000,000 gpd for Scottsdale's treatment facilities at a rate of \$6.00  
21 per gpd. (BHOA Ex. 2.) The Company's wastewater flows not treated at the Boulders WWTP are  
22 diverted into Scottsdale's wastewater treatment system and ultimately delivered to the City of  
23 Phoenix Regional 91<sup>st</sup> Avenue wastewater treatment plant. The Scottsdale Agreement has a term of  
24 20 years and expires at the end of 2016. (*Id.*) BMSC also has a 20-year Effluent Delivery Agreement  
25 with the Boulders Resort ("Effluent Agreement"), executed in 2001, that requires BMSC to deliver  
26 all effluent produced by the Boulders WWTP to the Boulders Resort for landscaping and golf course

27 <sup>18</sup> It is not clear if the additional 60,000 gpd package plant was ever constructed. In addition, the Commission denied the  
28 request by Boulders Carefree to approve a new site for future plant construction because "the request is too indefinite."  
(*Id.* at 3, 10.)

1 irrigation. (BHOA Ex. 3.) According to Mr. Peterson, the Boulders WWTP provides approximately  
2 30 percent of the Boulders Resort's effluent needs, and the remaining 70 percent is purchased from  
3 the Scottsdale treatment facilities. (BHOA Ex. 4, at 8.)

## 4                   2.       Background of BMSC Odor Issues

5       The subject of odor problems on BMSC's system has been an ongoing concern for residents  
6 in the Boulders community for a number of years. The nature and depth of customer complaints was  
7 described in BMSC's prior rate case and a proposed remedy was identified and approved in Decision  
8 No. 69164. For purposes of establishing a background for the issue, it is necessary to recount the  
9 facts and findings presented in the prior case.

10       In its prior case, the Company initially took the position that any odor problems that may exist  
11 were not related to the BMSC system. However, the Company later conceded that there was an odor  
12 problem being experienced by certain of its customers. Based on the public comments and sworn  
13 testimony presented by various witnesses in the prior case, there appeared to be general agreement  
14 that the odor problems reported by customers came from two separate sources, the CIE Lift Station  
15 and the wastewater line that flows under Boulder Drive in the Boulders subdivision. (Decision No.  
16 69164, at 30-31.)

17       With respect to the CIE lift station, BMSC recognized the problems associated with the CIE  
18 Lift Station and indicated that it was studying ways to bypass or eliminate the facility. The Company  
19 subsequently entered an agreement with an engineering company to eliminate and bypass the lift  
20 station and ultimately closed the lift station.

21       As described in BMSC's prior rate case, the more complicated odor issue involved ongoing  
22 complaints by residents in the Boulders subdivision, especially along Boulders Drive where the sewer  
23 line flowed to the Boulders WWTP. Testimony given in that case indicated that it was likely that the  
24 odors in the Boulders community were attributable to two problems: the long retention time that  
25 sewage sits in the Boulders line, thereby allowing the sewage to become septic; and "positive  
26 pressure" between the CIE Lift Station and the Boulders WWTP due to the fact that the lines between  
27 the lift station and discharge manholes in the Boulders community are pressurized, but were gravity  
28 lines from the Boulders manholes to the WWTP. (*Id.* at 32.)

1 In the prior case, BMSC asserted that it would be unfair for the Commission to impose  
2 additional odor remediation requirements, beyond compliance with ADEQ and MCESD standards,  
3 especially when such requirements may be beyond the Commission's jurisdiction. The Company  
4 argued that ordering additional remedial steps to be taken was not related to ratemaking, and absent  
5 evidence that BMSC's operations violated the governing odor standards, additional requirements  
6 would constitute improper interference with management of the utility. (*Id.* at 33.)

7 In Decision No. 69164, we rejected BMSC's jurisdictional arguments, finding that "the  
8 evidentiary record in this case amply supports the appropriateness of, and the need for, imposition of  
9 odor remediation requirements as a condition of granting the rate relief approved herein." (*Id.* at 34.)  
10 Citing to several statutes granting the Commission broad powers to remedy problems, in addition to  
11 its ratemaking authority, we directed BMSC to undertake certain specified actions. Specifically, we  
12 indicated that, with respect to a public service corporation's adequacy of service, A.R.S. §40-321(A)  
13 states:

14 When the commission finds that the equipment, appliances, facilities or  
15 service of any public service corporation, or the methods of manufacture,  
16 distribution, transmission, storage or supply employed by it are unjust,  
17 unreasonable, unsafe, improper, inadequate or insufficient, the  
commission shall determine what is just, reasonable, safe, proper,  
adequate or sufficient, and shall enforce its determination by order or  
regulation.

18 We also cited to A.R.S. §40-331(A), which states:

19 When the Commission finds that additions or improvements to or changes  
20 in the existing plant or physical property of a public service corporation  
21 ought reasonably to be made, or that a new structure or structures should  
22 be erected, to promote the security or convenience of its employees or the  
23 public, the commission shall make and serve an order directing that such  
24 changes be made or such structure be erected in the manner and within the  
time specified in the order. If the commission orders erection of a new  
structure, it may also fix the site thereof.

25 Finally, we referenced the authority granted to the Commission in A.R.S. §40-361(B), which  
26 provides as follows:

27 Every public service corporation shall furnish and maintain such service,  
28 equipment and facilities as will promote the safety, health, comfort and



1 convenience of its patrons, employees and the public, and as will be in all  
2 respects adequate, efficient and reasonable.

3 Based on these statutes, we concluded the Commission has the authority and the duty to  
4 protect the health, safety and welfare of a public service corporation's customers, and that in order to  
5 protect the security or convenience of the public, the Commission may specify not only the type of  
6 facilities that are required, but the timeframe in which the facilities must be constructed. (*Id.* at 35-  
36.)

7 In addition to the specific statutes cited above, we found that A.R.S. §40-202(A), provides  
8 additional supervisory authority to the Commission for regulation of public service corporations.<sup>19</sup>  
9 We also pointed out that the authority granted to the Commission under these statutes, as well as the  
10 Commission's constitutional powers pursuant to Article 15, §3 of the Arizona Constitution, were  
11 discussed in *Arizona Corp. Comm'n v. Palm Springs Utility Co., Inc.*, 24 Ariz. App. 124, 128, 536  
12 P.2d 245, 249 (App. 1975). In that case, the court held that "the regulatory powers of the  
13 Commission are not limited to making orders respecting the health and safety, but also include the  
14 power to make orders respecting comfort, convenience, adequacy and reasonableness of service...."  
15 (*Id.*). Accordingly, we directed BMSC to implement the system changes recommended by Carefree's  
16 witness, or undertake alternative solutions agreed to by the parties to the case, in order to enable all  
17 customers on the BMSC system to enjoy fully their property without enduring offensive odors. (*Id.* at  
18 37.)

### 19 3. Actions Taken by BMSC Following Decision No. 69164

20 Mr. Sorenson testified that BMSC deactivated the CIE lift station and, to address the odor  
21 problems along Boulders Drive, the Company rerouted sewer lines and installed air-jumper pipelines  
22 at four locations along the street between manholes to allow air to flow with the sewage and stop it  
23 from being released into the atmosphere. (Ex. A-1, at 4-5.) To remedy additional odor problems later  
24 discovered on Quartz Valley Court, the Company constructed a new sewer line and grinder pump  
25 station to permit sewage to flow freely. (*Id.* at 5.) He added that BMSC installed an odor scrubber at  
26

27 <sup>19</sup> A.R.S. §40-202(A), provides in relevant part: "The commission may supervise and regulate every public service  
28 corporation in the state and do all things, whether specifically designated in this title or in addition thereto, necessary and  
convenient in the exercise of that power and jurisdiction."

1 the plant, placed heavy rubber mats over grate openings covering treatment basins, and commissioned  
2 a noise study to determine the source of noises emanating from the plant. The noise study led to  
3 several projects aimed at reducing noises coming from the treatment plant. (*Id.* at 6.)

4 According to Mr. Sorenson's direct testimony, the Company's odor remediation efforts have  
5 resulted in reduced odors in the areas leading to the sewer plant, and BMSC had not received a single  
6 odor complaint from surrounding neighbors since the projects were completed. He added, however,  
7 that there continue to be occasional odor events and the Company meets regularly with officials from  
8 Carefree and the BHOA to address their ongoing concerns. (*Id.*) Mr. Sorenson claimed that the  
9 Company has worked with Carefree and Scottsdale to enforce commercial grease trap cleaning  
10 requirements, and to implement a fats, oils and grease disposal program to reduce dumping of those  
11 wastes into the sewer system. He indicated that BMSC has also introduced chemical additives into  
12 the collection system and installed Odor Loggers at the plant to detect and measure hydrogen sulfide  
13 levels. Mr. Sorenson stated that MCESD conducted one inspection since the last rate case, and the  
14 treatment plant was found to have only one minor violation, related to a signage issue that has since  
15 been corrected. (*Id.* at 7.)

#### 16 4. Boulders Community

17 The Boulders WWTP is situated in the midst of, and in close proximity to, a number of  
18 residences. According to the BHOA, odor problems persist in the community despite the Company's  
19 efforts to reduce odors from the collection system. The BHOA argues that the many letters, petitions  
20 and in-person public comment provided by residents confirm the existence of ongoing odor problems  
21 that directly affect their lifestyle, including an inability to leave windows open, noises that disturb  
22 sleep, embarrassment in hosting guests at their homes, and putting up with noxious odors on parts of  
23 the Boulders Resort golf course. (*See*, Tr. 10-44.) The BHOA claims that it is now clear that the  
24 odors experienced by Boulders residents were caused not only by the collection system, but also by  
25 the treatment plant. The BHOA also contends that BMSC has been much more cooperative since the  
26 Company's last rate case, when the Commission asserted its authority to require that odor  
27 remediation efforts be undertaken by BMSC. Mr. Peterson explained that BMSC has met regularly  
28 with the BHOA since the last case to identify and attempt to resolve ongoing odor issues. (Tr. 356,

1 362, 371.)

2 The BHOA points out that although it could have intervened to complain about the odor  
3 issues and looked to the Commission to fashion a remedy, it instead worked in cooperation with  
4 BMSC to come up with a solution for the odor issues. As a result of those discussions, BMSC and  
5 the BHOA came to an agreement that provides for closing of the Boulders WWTP, subject to several  
6 conditions. (BHOA Ex. 4, Ex. B.)

7 **5. Wastewater Treatment Plant Closure Agreement**

8 The Wastewater Treatment Plant Closure Agreement ("Closure Agreement") is a settlement  
9 agreement between the Company and the BHOA that requires BMSC to shut down the Boulders  
10 WWTP within 15 months of certain conditions being satisfied. Under the terms of the Closure  
11 Agreement, the conditions summarized below must be met before BMSC is obligated to close the  
12 treatment plant:

- 13 a. Existence of sufficient downstream collection system line capacity and  
14 flow-through capacity to the Scottsdale plant sufficient to  
15 accommodate the additional 120,000 gpd from the current treatment  
16 plant;
- 17 b. Successful negotiation of the purchase by BMSC from Scottsdale of  
18 120,000 gpd of additional capacity, and including renegotiation of the  
19 Scottsdale Agreement to allow purchase of the additional capacity  
20 beyond 2016, and a long-term right by BMSC to purchase additional  
21 capacity at market rates;
- 22 c. Successful renegotiation of the Effluent Agreement with the Boulders  
23 Resort to allow termination of the agreement with little or no cost to  
24 BMSC upon closure of the treatment plant;
- 25 d. Approval to close the treatment plant from applicable regulatory  
26 agencies; and
- 27 e. Approval by the Commission of a cost recovery mechanism that  
28 permits BMSC to recover a return on and of the capital costs of  
closure, including costs of procuring additional capacity from the City  
of Scottsdale, costs of engineering and other analyses necessary to  
complete the closure, system upgrades required as a result of the  
closure and/or delivery of the flows to Scottsdale previously treated at  
the plant. BMSC must also be authorized to recover reasonable costs  
of reaching agreements with BHOA, Scottsdale, and the Boulders  
Resort as required under the agreement, and costs of obtaining  
approval from the Commission. BMSC has no obligation under the  
agreement if the Commission does not approve a recovery mechanism  
in a form acceptable to the Company.

The Closure Agreement also requires BMSC to use all commercially reasonable efforts to

1 complete termination of treatment plant operations within 15 months of satisfaction of the conditions,  
2 and remove all of the treatment plant's structures and equipment not needed for continued operation  
3 of the Company's collection or transportation systems. Following restoration of the plant property,  
4 BMSC would retain full ownership of the site and would be required to sell the site as residential  
5 property, with the gain on the sale being split evenly between shareholders and ratepayers for  
6 ratemaking purposes. (*Id.* at 2-4.)

7           **6. Positions of the Parties Regarding Closure Agreement**

8           **a. BMSC**

9           BMSC contends that approval of the Closure Agreement is in the public interest and is a  
10 reasonable response to an extraordinary situation that exists currently on the Company's system. The  
11 Company points to the nearly unanimous support expressed by more than 500 customers, as well as  
12 the Mayor of Carefree, where approximately three-quarters of the Company's customers reside,  
13 through letters, petitions, and live statements, including support for the surcharge mechanism  
14 contained in the Closure Agreement. BMSC noted that support for the plant closure was also  
15 received from residents in the Boulders South community who are members of the OABS rather than  
16 the BHOA.

17           BMSC argues that it complied fully with the directives issued by the Commission in the  
18 Company's prior case to take remedial actions to mitigate odors on its collection and transportation  
19 system, and it has taken other steps beyond those directives such as installing an odor scrubber at the  
20 plant. According to the Company, it has taken all reasonable measures to eliminate odors on its  
21 system, but the presence of the treatment plant within the Boulders community presents an  
22 extraordinary challenge given the age of the plant and its close proximity to residential structures.

23           The Company claims that the treatment plant meets all applicable regulations and that no  
24 party disputes that it is used and useful in the provision of service to customers. However, according  
25 to Mr. Sorenson, BMSC attempted to accommodate its customers and the Town of Carefree by  
26 agreeing to a mechanism that would enable the Company to close the plant. Mr. Sorenson stated that  
27 BMSC would agree to close the plant, reroute sewage flows currently treated at the plant, and acquire  
28 additional treatment capacity only if it receives assurance from the Commission that the Company

1 would not have to wait for a return on and of its investment, or that it would be second-guessed as to  
2 why it agreed to invest more than \$1 million closing a treatment plant that is currently deemed used  
3 and useful. (Ex. A-2, at 7-8.) Mr. Sorenson contends that the plant closure project is estimated to cost  
4 in excess of \$1.5 million, and replacement capacity from Scottsdale for the plant flows would require  
5 approximately \$720,000 (at \$6.00 per gallon). (*Id.*)

6 BMSC witness Bourassa explained at the hearing how the Company envisions that the  
7 surcharge mechanism would operate, and presented an exhibit containing an illustration of the  
8 surcharge calculation. (Ex. A-11; Tr. 243-49.) According to Mr. Bourassa, once the cost of the plant  
9 closure project is known and measurable, an annual amortization would be computed and the return  
10 component, gross revenue conversion, and incremental income tax factors would be employed to  
11 calculate the additional revenue requirement associated with the project. (*Id.*) Under the Company's  
12 proposal, the plant closure revenue requirement would be divided by 12 to determine the overall  
13 monthly surcharge requirement, and that amount would then be divided by the number of customers  
14 to calculate the monthly surcharge per customer. (*Id.*) The same process would be undertaken after  
15 the plant site is sold to reflect the reduction to rate base associated with the sharing of the gain on sale  
16 of the property. Mr. Bourassa suggested that it would also be appropriate to require an annual true-up  
17 of the surcharge amount to avoid under or over-collection of the plant closure costs. (Tr. 249.)

18 For verification purposes, BMSC agrees that the surcharge should not go into effect until Staff  
19 (as well as other interested parties) have an opportunity to review documentation submitted by the  
20 Company in support of the surcharge, to ensure that the claimed costs were spent for the purposes  
21 intended and necessary for closure of the plant. BMSC contends that the process it proposes is  
22 similar to that used by the Commission for arsenic surcharge mechanisms during the past several  
23 years, and the Company contemplates that the Staff review process could be accomplished within 60  
24 days after submission of the necessary documentation, followed by the issuance of a Commission  
25 Order approving the surcharge. (Tr. 248, 252-53.) Mr. Bourassa testified that the requested surcharge  
26 would be comprised only of capital costs related to the plant decommissioning, and no O&M  
27 expenses would be included in the surcharge calculation. (Tr. 254.)

28 The Company disputes RUCO's claim that the proposed surcharge is not justified because it

1 does not address an extraordinary situation. BMSC argues that RUCO's philosophical opposition to  
2 adjustor and surcharge mechanisms should not override the desire expressed by a multitude of  
3 customers that they are willing to pay a surcharge in exchange for relief from ongoing odors caused  
4 by the treatment plant. The Company also claims that the Commission can limit the requested relief  
5 to the unique facts presented in this case in order to prevent the surcharge mechanism from being  
6 cited as precedent in future cases.

7 BMSC contends that RUCO has not offered any viable alternatives to the Company/BHOA  
8 proposal, and requiring BMSC to wait until after the closure project is completed, requiring rerouting  
9 of flows and the purchase of additional capacity, waiting for an additional year to ascertain changes  
10 in operating expenses, and then filing another rate case, is not a reasonable means of remedying the  
11 problems identified in this case. The Company argues that, contrary to RUCO's suggestion, it is not  
12 clear that the Commission has the legal authority to order BMSC to remove plant that is used and  
13 useful, and which is operating within regulatory requirements, because the decision of whether to  
14 close the treatment plant should be considered a decision within management's discretion. BMSC  
15 claims that the statutes cited by the Commission in the Company's last rate case as authority for  
16 ordering odor remediation measures do not expressly authorize the Commission to order the  
17 Company to make a substantial investment to retire used and useful plant. Citing *Southern Pacific*  
18 *Co. v. Arizona Corp. Comm'n*, 98 Ariz. 339, 346-48, P.2d 692, 694 (Ariz. 1965), BMSC contends  
19 that the Commission may not interfere with a utility company's management decisions absent clear  
20 statutory language.

21 The Company suggests that the debate over the Commission's authority should not  
22 overshadow the important concerns expressed by BMSC's customers, and the plant closure proposal  
23 presented in this case is not meant to diminish the Commission's broad powers. Rather, according to  
24 BMSC, its arguments on this point are intended to reflect that there exists a reasonable question as to  
25 whether the Commission has the authority to require the Company to spend substantial funds to  
26 decommission used and useful plant without a funding mechanism. BMSC contends that it is not  
27 necessary to reach that issue in this case because its customers overwhelmingly support paying a  
28 reasonable fee to eliminate the presence of the treatment plant in their community.

1                   **b.     BHOA**

2           The BHOA also supports approval of the Closure Agreement, for many of the same reasons  
3 cited by the Company. Mr. Peterson testified that, since the last rate case, BMSC has taken a more  
4 cooperative stance in working with the BHOA and Carefree in addressing the odor issues and that the  
5 Company meets regularly with the BHOA and the Town regarding odor concerns. (BHOA Ex. 4, at  
6 5; Tr. 356, 362-63, 371-73.)

7           The BHOA claims that RUCO's skepticism about whether removing the treatment plant  
8 would resolve the odor problems, is misplaced. The BHOA points out that the Closure Agreement  
9 requires that the entire plant be removed, as well as the associated lift station, which would leave only  
10 underground pipes and possibly a sealed manhole at the site. (Tr. 138-39.)

11          The BHOA also disputes RUCO's assertion that the implementation of a surcharge would  
12 violate the matching principle. According to the BHOA, the Commission regularly allows in rate  
13 base post-test year plant that is in service before the hearing in the case, and the Closure Agreement  
14 would allow review by the parties and the Commission of the actual closure costs before they are  
15 included in a surcharge mechanism. (Tr. 248, 252-53.)

16          The BHOA contends that the reasons for Staff's opposition to the Closure Agreement are less  
17 clear. BHOA points out that Staff witness Brown claimed that the Agreement was not relevant to  
18 BMSC's rate case, despite the Commission's lengthy discussion in the last rate case regarding odor  
19 issues. (Tr. 727-28.) The BHOA also asserts that the Staff engineer, Dorothy Hains, agreed that the  
20 Company should remedy the odor issues and, although she did not know if closing the plant would  
21 eliminate all of the odor and noise problems, she believed the closure would reduce the odors at the  
22 current plant site. (Tr. 657-58.)

23          The BHOA states that no party opposes closure of the treatment plant, and the only real  
24 opposition to the Closure Agreement is RUCO's concern with the approval of a surcharge  
25 mechanism absent extraordinary circumstances. The BHOA argues that, contrary to RUCO's  
26 assertion, the ongoing odor problems do represent an extraordinary situation that calls for an  
27 extraordinary solution. The BHOA claims that the remedy afforded by the Closure Agreement,  
28 including implementation of a surcharge mechanism, is justified as a proportional response to the

1 demand by customers to eliminate the treatment plant in order to solve the odor problems. As  
2 outlined by the BHOA, the level and magnitude of concern about this issue is evidenced by customer  
3 claims that the plant odors are extremely offensive and interfere with enjoyment of their property.  
4 BHOA concludes that given the Commission's prior expressions of a need to remedy odor issues, as  
5 well as the customers' overwhelming support for closure of plant and willingness to pay increased  
6 rates for that purpose, the Commission should approve the mechanism proposed in the Closure  
7 Agreement.

8                   c.     RUCO

9           RUCO contends that it does not oppose closure of the treatment plant, as provided for in the  
10 Closure Agreement, but it does oppose the funding mechanism contained in that agreement. RUCO  
11 witness Rigsby stated that RUCO's primary concern "is whether or not the terms of the proposed  
12 Agreement will actually solve the odor problem." (Ex. R-7, at 4.) He claims that RUCO is also  
13 concerned about "the broader ratemaking impacts and precedents that the Agreement may have on  
14 those BMSC residential ratepayers that are not directly affected by the odor problems and on Arizona  
15 residential ratepayers in general." (*Id.*)

16           According to Mr. Rigsby, there is no definitive agreement as to the source of the odor  
17 problems and the Commission should ascertain the actual source of the odors before adopting the  
18 Closure Agreement. (*Id.*) With respect to the ratemaking implications of approving a surcharge, Mr.  
19 Rigsby cites to two prior cases involving Arizona Water wherein the Commission discussed potential  
20 concerns with "automatic adjustment mechanisms." (*Id.* at 5-6.)<sup>20</sup> Mr. Rigsby claims that the same  
21 type of "mismatch" concerns would be presented with the mechanism proposed in the Closure  
22 Agreement. He distinguished the proposed surcharge mechanism in this case from arsenic cost  
23 recovery mechanisms on the basis that the arsenic reduction requirements were imposed by federal  
24 regulations and had a substantial impact on certain water utilities in Arizona. (*Id.* at 7-8.) Mr. Rigsby

25  
26 <sup>20</sup> In Decision No. 66849 (March 19, 2004), at 13-14, the Commission discussed automatic purchased power and water  
27 adjustment mechanisms for Arizona Water and stated that such automatic pass-throughs could provide a disincentive to  
28 obtain the lowest possible costs for those commodities. In Decision No. 68302 (November 14, 2005), at 45-46, the  
Commission expressed concerns with adjustment mechanisms because they allow automatic adjustments without a  
simultaneous review of unrelated costs. The Commission concluded that such mechanisms should only be used in  
"extraordinary circumstances."



1 recommended that the Commission reject the Closure Agreement's recovery mechanism, and only if  
2 "the treatment facility is found to be the source of the odor problem...[should] the Commission allow  
3 BMSC to retire the treatment facility and require the Company to file a general rate case application  
4 twelve months after the retirement." (*Id.* at 9.)

5 Mr. Rigsby testified that he is not aware of any prior cases where a substantial number of a  
6 company's customers came forward and agreed to imposition of a surcharge in exchange for remedial  
7 action, but indicated that the situation does not rise to the level of an extraordinary event that would  
8 justify a recovery mechanism. (Tr. 529-31, 560-61.) He explained that because it is RUCO's role to  
9 represent residential ratepayers, "yeah, I guess it's – you want to put it that way, that we are trying to  
10 save people from themselves or we are trying to put forth an alternative that might work out better in  
11 their interest in the long run." (*Id.* at 527.) He admitted, however, that the "alternative" RUCO was  
12 suggesting (*i.e.*, allowing deferral of the capital costs associated with the closure project through an  
13 accounting order), would likely not actually help the Company or its customers, or cause BMSC to  
14 voluntarily decommission the plant. (*Id.* at 527-29, 552-62.)

15 RUCO argues on brief that it is concerned with the unintended consequences of approving a  
16 recovery mechanism because it would not limit the monetary impact on customers, and the Company  
17 did not identify when it plans to file its next rate case. RUCO theorizes that BMSC could continue to  
18 assess the Closure Agreement surcharge indefinitely, thereby producing a windfall for shareholders at  
19 the expense of ratepayers. (RUCO Reply Brief at 8.)

20 **d. Staff**

21 Staff asserts that odors are an unavoidable byproduct of the sewer business and it is not  
22 certain that removing the treatment plant and lift station would resolve all of the odor problems that  
23 currently exist. Staff's engineer testified at the hearing that odors could come from other parts of the  
24 Company's system, including other lift stations, although she agreed that the public comment by  
25 customers indicated that the odors were caused by the treatment plant. (Tr. 640-41.)

26 Staff witness Hains testified at the hearing that because houses in Arizona typically have air  
27 conditioning, residents could keep their windows shut to avoid unpleasant odors because the odors  
28 are not constant. (Tr. 650-51.) She suggested that BMSC could place additional odor control

1 equipment on the plant or completely enclose the plant, and the customers may "have to [choose  
2 between] the odor problem or looking pretty around there." (*Id.* at 653.)

3 Staff contends that the proposed decommissioning presents a unique set of circumstances, but  
4 that it is difficult to justify removal of the plant since the plant is currently used and useful, it is  
5 functioning normally, and the complaints regarding odors and noises at the plant are due to its  
6 proximity to homes rather than mechanical problems. Staff argues that despite the near unanimous  
7 desire of the Company's customers to close the treatment plant, "where reliability and compliance are  
8 being met, it is difficult to justify such an exorbitant price tag [estimated \$1.5 to \$2 million] as a  
9 simple gesture of good will." (Staff Initial Brief at 25.) Staff then states that although there is no  
10 "down side" to the project, except for the cost and possibility that all odors will not be eliminated,  
11 "[i]t is Staff's position that a consideration of the circumstances yields no clear choice." (*Id.* at 26.)

#### 12 7. Resolution

13 Based on the unique facts and circumstances presented in this case through testimony and  
14 exhibits, and upon consideration of the overwhelming and extraordinary level of customer  
15 participation and comment in support of closure of the Boulders WWTP, we find, subject to the  
16 clarifications and modifications discussed herein, that the Closure Agreement proposed by the  
17 Company and the BHOA represents a reasonable resolution of the current odor concerns expressed  
18 by hundreds of BMSC's customers.

19 We do not believe that customers should be required to endure offensive odors at levels and  
20 frequencies that have been described in the public comments provided in this case. As we have  
21 indicated previously, although public comment is not considered evidence in a proceeding, it  
22 provides useful insight to the Commission regarding customer experiences, both observational and, in  
23 this instance, olfactory. In addition to the more than 500 public comment letters and petitions filed in  
24 this case requesting closure of the treatment plant, and expressing agreement with implementation of  
25 a surcharge, a number of customers traveled to the Commission to offer in-person public comment on  
26 the first day of the hearing. The Mayor of Carefree, David Schwann, stated that he believes the  
27 citizens of the Town support the agreement negotiated by the BHOA, even those residents not  
28 directly affected by the odors from the treatment plant. (Tr. 10-12.) Other residents described dealing

1 with odor issues for more than 20 years, and the level of frustration with not having a solution to the  
2 problem; the need to apologize to guests for having to endure "third world [odor] conditions in a first  
3 class resort;" ongoing odor issues despite improvements along Boulders Drive after the prior case;  
4 not being to eat meals on the patio due to odors; the almost unbearable smell on parts of the golf  
5 course; and an inability to barbecue because of the treatment plant odor, and continuous blower  
6 noises from the plant. (Tr. 12-25.) A resident of the South Boulders community, and member of the  
7 OABS, indicated that visitors to the Boulders Resort golf course are "amazed and disgusted" by the  
8 smell from the treatment plant that is located near several holes on the course (Tr. 26-27), while  
9 another resident described having to move Thanksgiving dinner indoors from his patio due to the  
10 treatment plant odors. (Tr. 30-31.) A former reporter indicated that he did not live close to the plant  
11 but experienced odors when passing by the vicinity of the plant (Tr. 32), and another resident stated  
12 that the odors from the plant are hurting home values and, despite BMSC's efforts to solve the  
13 problem, there does not appear to be a solution short of decommissioning the plant. (Tr. 34.) Another  
14 resident claimed that the treatment plant was intended as a temporary facility to serve a small number  
15 of homes and the plant is more than 40 years old and is obsolete. He added that because an  
16 alternative is available through rerouting of flows to the Scottsdale treatment facility, and because the  
17 odors are "a blight on real estate titles in the area," the only viable solution is closure of the plant. (Tr.  
18 37-38.) A customer that lives adjacent to the treatment plant stated that he has been awakened during  
19 the night by loud banging noises from the plant, that he is embarrassed to invite guests over, and he  
20 must keep his doors and windows closed to block odors from the treatment plant. He also expressed  
21 health-related concerns with living near the treatment plant due to the use of chemicals at the site.  
22 (Tr. 39-40.) A mother with young children indicated that the treatment plant should be  
23 decommissioned because the equipment is antiquated and inefficient, and that closure is necessary to  
24 provide a healthy environment for families living in the community. (Tr. 42-43.) Numerous other  
25 customers appeared at the hearing and signed slips indicating that they did not wish to speak but  
26 supported closure of the treatment plant and the Closure Agreement, including the surcharge  
27  
28

1 mechanism.<sup>21</sup>

2       The public comments offered in this proceeding make clear that customers in BMSC's service  
3 area, especially those living in close proximity to the treatment plant, have endured and continue to  
4 endure offensive odors related to the Boulders WWTP. The unrefuted evidence establishes that: the  
5 treatment plant is more than 40 years old; the plant was not intended to be a permanent sewage  
6 treatment solution and was not designed to serve more than a fraction of the Company's current  
7 customer base; and houses were built closer to the plant than was initially intended and closer than  
8 current regulations would permit. The record also indicates that despite its age, the treatment plant  
9 operates within regulatory limits imposed by ADEQ and MCESD with respect to odors and noises,  
10 and that the plant is considered used and useful for purposes of setting rates. Given these established  
11 facts, and considering the almost unanimous support by customers for closing the plant, it was  
12 entirely appropriate for the Company to engage affected parties in settlement discussions to find an  
13 acceptable solution to the odor problems. The product of those discussions is the Closure Agreement,  
14 which was executed by the Company and the BHOA.

15       As summarized above in detail, the Closure Agreement provides that BMSC will, among  
16 other things: close the Boulders WWTP within 15 months of satisfaction of the listed conditions;  
17 acquire additional capacity rights with the City of Scottsdale to replace the treatment plant capacity;  
18 renegotiate the Effluent Agreement with the Boulders Resort to allow termination of the agreement;  
19 obtain regulatory approvals from applicable regulatory agencies; undertake engineering and other  
20 analyses necessary to complete the closure; and complete system upgrades required as a result of the  
21 closure and/or delivery of the flows to Scottsdale previously treated at the plant.

22       Staff's position on the Closure Agreement is not entirely clear, but it appears Staff's only  
23 concern is that there may still be odors on BMSC's system even if the treatment plant is closed and  
24

25 <sup>21</sup> The only opposing public comment at the hearing was from Max Schirtzinger, an intervenor who stated that he is a  
26 professional engineer. Although Mr. Schirtzinger was granted intervention, he did not pre-file testimony. At the hearing,  
27 Mr. Schirtzinger agreed that his "opening statement" would be treated as public comment. (Tr. 79-81.) He offered a  
28 number of comments related to alleged deficiencies in the Company's operation of the treatment plant, and suggested that  
the plant should remain in operation as a "water reclamation facility." (Tr. 73-74.) Mr. Schirtzinger added that: if the  
plant is decommissioned, the entire Company should be decommissioned and the City of Scottsdale should assume  
operational control; customers should not bear the costs of decommissioning; and he suggested that instead of  
decommissioning, the treatment plant could be upgraded to treat 240,000 gpd of wastewater flows. (Tr. 75-78.)

1 therefore the cost of decommissioning the plant is too high. Although it is likely some odors will  
2 continue to be noticed on occasion from other parts of the Company's system, as is the case with  
3 virtually any wastewater system, the treatment plant appears to be the primary source of the ongoing  
4 and frequent noxious odors described by customers. The odors, as well as loud noises, are  
5 experienced not only by residents that live near the plant, but also by visitors to the golf course and  
6 Boulders Resort. We do not believe it is sufficient, as suggested by the Staff witness, to require  
7 residents and visitors alike to simply deal with the odors and noises from the plant by being forced  
8 inside with closed windows and doors.

9 Nor are we persuaded by the arguments made by RUCO. Mr. Rigsby indicated that, similar to  
10 Staff's assertion, RUCO's primary concern is that the odor problem will not be solved by the plant  
11 closure. However, Mr. Rigsby admitted that closure of the plant and lift station at the plant site,  
12 along with placing all remaining pipes underground, would resolve the odor issues at the current plant  
13 site. There is no evidence that excessive, persistent odors have been experienced on other areas of  
14 BMSC's system (following completion of the CIE and Boulders Drive work) and, to the extent that  
15 future odor complaints are received following the treatment plant's closure, those issues may be  
16 addressed in a future proceeding.

17 RUCO's other concern is that approval of the surcharge mechanism proposed in the Closure  
18 Agreement would open the door for other companies to seek similar relief. Mr. Rigsby cited to two  
19 prior Decisions involving Arizona Water in which the Commission denied proposals for automatic  
20 adjustment mechanisms. Mr. Rigsby conceded, however, that those adjusters were distinguishable  
21 from the mechanism proposed in this case because they involved automatic adjusters for purchased  
22 water and electricity that would have continued in perpetuity unless ended by the Commission,  
23 compared with the temporary surcharge that would end after the first rate case following completion  
24 of the plant's closure. The proposed closure surcharge is actually much more similar to the ACRMs  
25 that have been approved in a number of prior cases, and which were agreed to by RUCO. Indeed, the  
26 proposed surcharge in this case is actually more benign than the ACRM to the extent that the closure  
27 surcharge would allow only capital costs to be recovered, whereas the ACRMs allowed multiple  
28 recovery filings and permitted recovery of some O&M costs in addition to capital costs.

1 Mr. Rigsby agreed that he had never in his many years of experience witnessed a case in  
2 which more than 500 customers submitted and expressed support for closure of a plant, as well as a  
3 willingness to pay a surcharge to complete the closure. He also agreed that to avoid the possibility  
4 that other companies would seek to use the closure surcharge as a means of obtaining adjustment  
5 mechanisms, the Commission could, as it often does, limit the approval to the specific facts in this  
6 case.

7 We believe that allowance of a reasonable surcharge to permit BMSC to collect legitimate  
8 capital costs, for the narrow and explicit purpose of affording relief from noxious odors, is within the  
9 Commission's constitutional and statutory authority and is consistent with our obligation to balance  
10 the interests of public service corporations and their customers. We do not believe that being  
11 responsive to the concerns expressed by customers in this case will open the floodgates to a spate of  
12 adjustment mechanism applications, given the unique characteristics of this case. There is no other  
13 instance recounted in the record in which customers of a company have so overwhelmingly supported  
14 a solution to a quality of life issue, as well as a willingness to pay a reasonable charge to bring that  
15 solution to fruition. RUCO's attempt to save BMSC's customers from themselves is contrary to the  
16 wishes of the very customers RUCO represents. Moreover, RUCO's position fails to give  
17 recognition to the real world experiences that were described so forcefully by customers regarding the  
18 inability to enjoy their own property, the embarrassment of inviting guests to their homes, and the  
19 possibility that treatment plant odors and noises have an effect on community property values.

20 All of these facts, and the broad support shown by customers for decommissioning of the  
21 treatment plant, lead us to the conclusion that the Closure Agreement signed by BMSC and the  
22 BHOA provides an appropriate and creative solution for what we believe is a unique set of  
23 circumstances that is not likely to be repeated. Absent the strong community support for closure,  
24 including the willingness of customers to offset the closure costs through the surcharge mechanism,  
25 as well as the ability of the Company to divert the current treatment plant flows by acquiring  
26 additional capacity from Scottsdale under an existing agreement, it is likely that the Boulders WWTP  
27  
28

1 would have remained in operation for the foreseeable future.<sup>22</sup>

2 We wish to make clear that our approval of the surcharge mechanism approved in this Order  
3 is based solely on the facts of this case, and should not be interpreted as precedent for other surcharge  
4 or adjustment mechanisms. This case presents an extraordinary set of facts and circumstances that  
5 calls for an extraordinary remedy that we believe is achieved by the Closure Agreement.

6 **8. Surcharge Mechanism**

7 Having approved the surcharge mechanism, as outlined in the Closure Agreement, it is  
8 necessary to develop a framework for its operation. Consistent with Company witness Bourassa's  
9 testimony, we find that the function of the surcharge process should be similar to that employed in the  
10 prior ACRM cases. In addition to the conditions set forth in the Closure Agreement, BMSC will be  
11 required to comply with the following requirements:

- 12
- 13 a. BMSC will be required to collect and track all surcharge revenues and  
expenditures in a separate account to allow expedited review.
  - 14 b. In order to effectuate the surcharge, BMSC will be required to file a  
15 set of schedules (and provide copies to the other parties) that includes  
the type of information required by Staff to review the ACRM step  
16 increase requests.
  - 17 c. Only a single surcharge filing request will be permitted and no  
18 additional "true-ups" will be permitted until the Company's post-  
completion rate case.
  - 19 d. The Company shall cooperate with Staff and provide all information  
requested by Staff to perform its review of the revenues and  
20 expenditures that support the requested surcharge, in accordance with  
the terms of the Closure Agreement.
  - 21 e. Upon completion of its review, Staff shall prepare a recommendation  
for the Commission's consideration and approval. Staff should  
22 attempt to complete its review and recommendation within 60 days of  
the surcharge request filing, but no specific deadline will be imposed  
for completion of Staff's review.
  - 23 f. The closure surcharge shall not exceed \$15 per month, per customer,  
and shall be discontinued upon issuance of a Decision in the  
24 Company's first rate case following completion of the closure project.
  - 25 g. BMSC will be required to file a full rate application no later than 12  
26 months after completion of the closure project. The treatment plant  
closure project shall be considered to have reached completion upon  
issuance of a Commission Order approving Staff's recommendation
- 27

28 <sup>22</sup> We need not, at this time, address the Company's argument that the Commission lacks authority to order that the  
treatment plant be closed without a recovery mechanism, given the agreement reached with the BHOA.

for implementation of a closure surcharge.

- h. The methodology for calculating the surcharge shall be consistent with, although not necessarily identical to, that described in Ex. A-11 in the evidentiary record of this proceeding.
- i. The surcharge shall not go into effect until the Commission has approved the amount of the surcharge following Staff's review and recommendation.

With these additional requirements, we find that the Closure Agreement, and surcharge mechanism contained therein, properly balances the needs of BMSC and its customers for the provision of wastewater service in a safe, reliable and, to the extent possible, odor-free manner.

#### **B. Refund of Hook-Up Fee Funds**

In BMSC's prior rate case, we agreed with the Company and Staff that \$833,367 should be refunded to customers due to unexpended hook-up fees held by BMSC. The \$833,367 represented \$452,467 for land purchased with hook-up fee funds and \$380,900 for hook-up fees held in a Company account. (Decision No. 69164, at 29.) We required BMSC, as a condition of implementing the rate increase authorized by that Decision, to calculate the amount of the refund due to customers on a per customer basis, irrespective of customer class. (*Id.*) As a result, BMSC refunded \$412.15 to each customer on record. (Carefree Ex. 1, at 3.) After the refunds were issued, the Carefree Estates Homeowners Association ("CEHA") sought to require BMSC to issue refund checks to each of its 33 members rather than the single check the CEHA received as the customer of record that is billed by BMSC for all 33 residents.<sup>23</sup>

On December 7, 2007, a Joint Stipulation between Carefree, BMSC, and RUCO was filed in the Company's prior rate case docket (Docket No. SW-02361A-05-0657), along with a request for clarification or amendment of Decision No. 69164 pursuant to A.R.S. § 40-252. The Stipulation provided that BMSC would refund \$405.73 to each of the Carefree Estates residents, and would debit the accounts of its other customers by \$6.62, in order for the \$833,367 overall refund amount ordered to remain unaltered. (Carefree Ex. 1, Attach. 1.) The Commission did not act to amend or reconsider the issue raised by the joint filing and the matter was raised again by the Town in this docket.

The Company continues to support the relief requested by the CEHA on behalf of its residents

<sup>23</sup> The Town of Carefree represented the interests of the 33 residents in seeking individual refunds and intervened in this proceeding to continue its advocacy for the CEHA residents.



33. The record supports a finding that residents in the Carefree Estates subdivision should receive a proportionate share of the hook-up fee refunds that were distributed following issuance of Decision No. 69164, to be calculated in the manner described herein, and that residents in the Carefree Estates should henceforth be billed as individual customers by BMSC.

34. The record supports a finding that, as modified and clarified herein, the Closure Agreement between BMSC and the BHOA represents a reasonable resolution of the current odor concerns expressed by hundreds of BMSC's customers. As provided in the Closure Agreement, a surcharge mechanism is authorized under the framework discussed herein to accomplish closure and decommissioning of the Boulders WWTP.

35. The record supports a finding that intervenor Dr. Doelle's dental office, as well as other similarly situated dental office customers of BMSC, should be billed as health care providers under ADEQ Bulletin No. 12, as provided in the discussion herein.

36. The record supports a finding that BMSC should be authorized to implement a hook-up fee tariff in the form submitted with the Company's final schedules.

## CONCLUSIONS OF LAW

1. BMSC is a public service corporation within the meaning of Article XV of the Arizona Constitution and A.R.S. §§40-250, 40-251, 40-367, 40-202, 40-321, 40-331, and 40-361.

2. The Commission has jurisdiction over BMSC and the subject matter contained in the Company's rate application.

3. The rates, charges and conditions of service established herein are just and reasonable and in the public interest.

## ORDER

IT IS THEREFORE ORDERED that Black Mountain Sewer Corporation is hereby authorized and directed to file with the Commission, on or before August 31, 2010, revised schedules of rates and charges consistent with the discussion herein, as set forth below.

|                                 |            |
|---------------------------------|------------|
| Residential Service – Per Month | \$65.24    |
| Commercial - Regular (c)        | \$0.248734 |

## Effluent Sales

|   |                                   |            |
|---|-----------------------------------|------------|
| 1 | Per thousand gallons              | \$0.460510 |
| 2 | Service Charges                   |            |
|   | Establishment                     | \$25.00    |
| 3 | Re-establishment                  | \$25.00    |
|   | Re-connection                     | No Charge  |
| 4 | Minimum Deposit (Residential)     | (a)        |
|   | Minimum Deposit (Non-Residential) | (a)        |
| 5 | Deposit Interest                  | 6%         |
| 6 | NSF Check Charge                  | \$10.00    |
|   | Deferred Payment Finance Charge   | 1.50%      |
| 7 | Late Charge                       | 1.50%      |
|   | Main Extension Tariff (b)         | Cost       |
| 8 | Off-site Facilities Hook-up Fee   | Per Tariff |

9 (a) Per A.A.C. R14-2-603B; Residential – two times average bill, Non-residential – two  
10 and one-half times average bill;

11 (b) Per A.A.C. R14-2-606(B);

12 (c) Per Gallon per Day. Wastewater flows are based on ADEQ Engineering Bulletin No.  
13 12, in accordance with this Decision.

14 IT IS FURTHER ORDERED that the revised schedules of rates and charges shall be effective  
15 for all service rendered on and after September 1, 2010.

16 IT IS FURTHER ORDERED that Black Mountain Sewer Corporation shall notify its  
17 customers of the revised schedules of rates and charges authorized herein by means of an insert in its  
18 next regularly scheduled billing, or by separate mailing, in a form acceptable to Staff.

19 IT IS FURTHER ORDERED that Black Mountain Sewer Corporation shall file its request for  
20 a treatment plant closure surcharge in accordance with the terms of the Closure Agreement and the  
21 conditions and requirements set forth hereinabove. The closure surcharge shall not go into effect  
22 until the Commission has approved the amount of the surcharge following Staff's review and  
23 recommendation.

24 IT IS FURTHER ORDERED that Black Mountain Sewer Corporation shall file a full rate  
25 application no later than 12 months after completion of the treatment plant closure project.

26 IT IS FURTHER ORDERED that the treatment plant closure project shall be considered to  
27 have reached completion upon issuance of a Commission Order approving Staff's recommendation  
28 for implementation of a closure surcharge.

IT IS FURTHER ORDERED that Black Mountain Sewer Corporation shall issue refunds to

1 the residents in Carefree Estates, with corresponding debits to the remaining accounts that received  
2 refunds of hook-up fee funds in accordance with Decision No. 69164. The Company shall make the  
3 refunds and debits within 30 days of the effective date of this Decision, and shall file within 30 days,  
4 as a compliance item with Docket Control, notification of completion of the refunds and debit. For  
5 accounts that incur a debit as a result of this action, The Company shall provide notification as to the  
6 reason for the debit in the first billing cycle following the effective date of this Decision.

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1 IT IS FURTHER ORDERED that Black Mountain Sewer Corporation shall, in its next rate  
 2 application, present evidence regarding alternative methods for calculating sewage flow assumptions  
 3 used for billing its commercial customers. The Company shall consider, at a minimum: contacting  
 4 ADEQ regarding plans for revising Bulletin No. 12; other sewage flow data based on technological  
 5 improvements and conservation assumptions; and whether it is possible to obtain actual water usage  
 6 data from the water utilities in the Company's service area for purposes of calculating more accurate  
 7 wastewater flows on its system.

8 IT IS FURTHER ORDERED that this Decision shall become effective immediately.

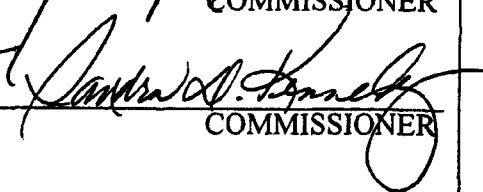
9 BY ORDER OF THE ARIZONA CORPORATION COMMISSION.

10   
 11 CHAIRMAN

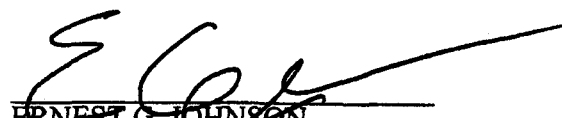
  
 COMMISSIONER

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 13 COMMISSIONER

  
 COMMISSIONER

  
 COMMISSIONER

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 16 IN WITNESS WHEREOF, I, ERNEST G. JOHNSON,  
 17 Executive Director of the Arizona Corporation Commission,  
 18 have hereunto set my hand and caused the official seal of the  
 Commission to be affixed at the Capitol, in the City of Phoenix,  
 this 31<sup>st</sup> day of August, 2010.

19   
 20 ERNEST G. JOHNSON  
 21 EXECUTIVE DIRECTOR

22 DISSENT \_\_\_\_\_

23  
 24 DISSENT \_\_\_\_\_

## **ATTACHMENT “E”**

**RYLEY CARLOCK  
& APPLEWHITE**  
*Attorneys*

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June 3, 2011

**HAND-DELIVERED**

Jay Shapiro, Esq.  
Fennemore Craig  
3003 N. Central Avenue  
Suite 2600  
Phoenix, Arizona 85012-2913

Re: The Boulders v. Black Mountain Sewer Corporation

Dear Mr. Shapiro:

We are writing to you in your capacity as counsel for Black Mountain Sewer Corporation ("Black Mountain Sewer"). Please be advised that Michele Van Quathem and I have been engaged by Wind P1 Mortgage Borrower, LLC, doing business as The Boulders ("The Boulders"), along with co-counsel Janet Betts and Danelle Kelling, to represent it in connection with enforcing its rights under the 2001 Effluent Delivery Agreement with Black Mountain Sewer. In accordance with our instructions, pursuant to Paragraph 14(a), we formally invoke and require that Black Mountain Sewer's Designated Representative personally meet and confer with us at the earliest practicable date to engage in good-faith negotiations to resolve our pending dispute. Pursuant to Paragraph 14(b), if we are unable to resolve this dispute promptly, we reserve the right to initiate binding arbitration of all issues subject to arbitration, including but not limited to damages. In invoking this process, we are not waiving our right to pursue any and all legal and equitable remedies through the courts or in any appropriate administrative proceedings, through direct legal actions or through intervention in existing actions or proceedings, in our sole discretion.

We have formally invoked this meeting process under our contract in light of the long and disappointing history of informal discussions with Black Mountain Sewer. We have attempted in good faith to cooperate with Black Mountain Sewer to find appropriate solutions, but Black Mountain Sewer to date has failed to provide any assurances of its intentions to honor its contractual obligations to The Boulders, or to provide suitable replacement water without detriment to The Boulders. In fact, in reviewing the history of these discussions, Black Mountain Sewer has repeatedly appeared to disregard or dismiss those obligations. Moreover, to add insult to injury, in expressly seeking to terminate Black

Mountain Sewer's contractual obligations to The Boulders without securing replacement water or offering any compensation (or even offering the land at a substantially reduced purchase price), the draft document you just forwarded to Ms. Kelling underscores Black Mountain Sewer's unjustified and irresponsible refusal to honor or even to acknowledge those obligations.

Consistent with your client's refusal to acknowledge its obligation, Black Mountain Sewer has stated that it has no intention of properly compensating The Boulders in the event that Black Mountain Sewer elects to close its wastewater treatment plant. Black Mountain Sewer's failure to acknowledge its continuing obligation to The Boulders not only constitutes an anticipatory breach of contract, but also demonstrates bad faith in regard to Black Mountain Sewer's obligations. Accordingly, we have been retained to pursue appropriate legal action if Black Mountain Sewer does not promptly propose an appropriate resolution acceptable to The Boulders. In addition to seeking appropriate declaratory and other equitable relief as well as damages, we will also seek reimbursement of The Boulders' attorneys' fees and expenses.

There is no reasonable question that Black Mountain Sewer bears the legal responsibility to make appropriate arrangements to provide The Boulders with suitable replacement water after Black Mountain Sewer ceases operations at its wastewater treatment plant. The Effluent Delivery Agreement contractually obligates Black Mountain Sewer to provide 150,000 gallons per day to The Boulders at the contractually specified price for the 10-year term remaining under the contract, or through 2021. Moreover, pursuant to Paragraph 6, subparagraphs (a) and (c), Black Mountain Sewer made specific representations and covenants in the agreement, including to "[m]ake such repairs, upgrades and improvements to the Boulders East Plant as may be necessary" to operate the facility to meet Black Mountain Sewer's obligations to The Boulders. By failing to address the facility's odor issues in a timely fashion to the residents' satisfaction, and instead allowing the situation to continue to the point where Black Mountain Sewer has instead negotiated an intended closure plan, Black Mountain Sewer has violated its covenants and acted in a fashion intended to deprive The Boulders of its benefits under the agreement.

Moreover, The Boulders had the legal right to rely on these representations, covenants and promises under the agreement, and in fact, has done so. But for the existence of these legally binding commitments by Black Mountain Sewer, The Boulders would undoubtedly have pursued other water sources and solutions over the last decade. However, having relied, as we were entitled to do, on Black Mountain Sewer's 20-year contractual commitment, options that might have been more cost-effective if pursued years ago are now either unavailable, impractical or infeasible because of the extraordinary costs. Black Mountain Sewer's conduct has left The Boulders in this highly problematic situation, and Black Mountain Sewer is legally responsible to The Boulders to address this situation and take steps to mitigate The Boulders' existing and potential damages. Quite simply, and with

no pun intended, Black Mountain Sewer has acted as if it is somehow acceptable to leave The Boulders "high and dry" while pursuing an intended plant closure.

Leaving aside the fact that Black Mountain Sewer's conduct leading up to the intended plant closure was itself a breach of the agreement with The Boulders, Black Mountain Sewer cannot simply terminate its obligations to The Boulders without its consent. Indeed, we are troubled by Black Mountain Sewer's negotiated condition in its intended closure plan that specifies that it be allowed to terminate the obligation to The Boulders at little to no economic cost. That condition could not have been stipulated in good faith because, as already noted, The Boulders has relied on that agreement, and it is Black Mountain Sewer's responsibility to mitigate (or, if necessary, compensate) The Boulders under these circumstances.

Specifically, we expect and demand that Black Mountain Sewer agree to the following terms:

(1) Black Mountain Sewer must cooperate with and assist The Boulders in making arrangements for replacement water pursuant to a plan that will ensure that such water is available, and will be delivered without any interruption in service created by the closure of the wastewater treatment plant, or any reduction in its service leading up to that closure.

(2) In the event that any replacement water secured under paragraph 1 above involves additional costs beyond the amount that would have been owed by The Boulders under the Effluent Delivery Agreement, then Black Mountain Sewer will accept responsibility for paying or reimbursing these costs.

(3) Black Mountain Sewer will not continue to represent or imply to the Arizona Corporation Commission or any other public entity that Black Mountain Sewer may be able to evade its financial responsibility to The Boulders. We do not consent to any such representation and, in fact, are sending you this letter to inform you explicitly that we reserve and intend to enforce our legal rights in this matter to the fullest extent possible, unless a good-faith effort by Black Mountain Sewer results in a mutually acceptable resolution within the next 30 days.

(4) Black Mountain Sewer will agree to keep The Boulders fully informed about, and will consult with, The Boulders and its legal counsel regarding any legal action, including court cases and administrative proceedings, as well as enforcement actions or government investigations. Black Mountain Sewer must agree that it will not oppose any motion or other effort by The Boulders to intervene in any such matters.



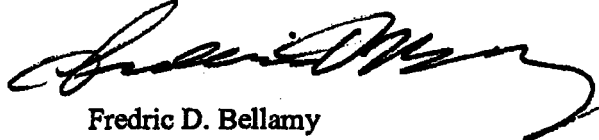
Jay Shapiro, Esq.  
June 3, 2011  
Page 4

**RYLEY CARLOCK**  
**& APPLEWHITE**  
*Attorneys*

In exchange for Black Mountain Sewer's agreement to these terms, The Boulders will agree not to pursue its current damages or attorneys' fees and expenses from Black Mountain Sewer. We are willing to waive such claims in exchange for a prompt agreement by Black Mountain Sewer to honor its obligations because we believe that continued cooperation and compromise would be in the best interests of the parties and of the community. However, please understand that we reserve all rights to prosecute any and all available claims, if we are forced to take legal or other action to protect our interests in this matter.

Pursuant to Paragraph 14(a) of the Effluent Delivery Agreement, we are sending copies of this letter to the designated addressees for receipt of formal notices. Please advise us at your earliest opportunity of your and your client's availability for a meeting with us to discuss and attempt to resolve this dispute.

Sincerely yours,



Fredric D. Bellamy

FDB/sdd

cc: Black Mountain Sewer Company (via Federal Express)  
c/o Mr. Greg Sorensen  
Suite 201, 1962 Canso Road  
Sidney, British Columbia  
Canada V8L 5V5

Algonquin Power Income Fund (via Federal Express)  
c/o Mr. Peter Kampian  
Alonquin Power Corporation, Inc.  
#210, 2085 Hurontario Street  
Mississauga, Ontario L5A 4G1

## **ATTACHMENT “F”**

**ORIGINAL**

Marilyn H. Courier  
P.O. Box 2956  
Carefree, AZ 85377

Arizona Corporation Commission  
1200 West Washington Street  
Phoenix, AZ 85007-2927

June 1, 2011

Re: Black Mountain Sewer Corporation  
Docket No: SW-02361A-08-0609  
De-commissioning the Boulders WWTP

Commissioners: Gary Pierce, Chairman  
Brenda Burns, Commissioner  
Sandra D. Kennedy, Commissioner  
Paul Newman, Commissioner  
Bob Stump, Commissioner

Dear Commissioners,

On August 23, 2010, many members of the Boulders Homeowner Association ("BHOA"), attended the Arizona Corporation Commission ("ACC") Open Meeting to express the importance of decommissioning and removing the Wastewater Treatment Plant ("WWTP"), owned by Black Mountain Sewer Corporation ("BMSC"), which was placed in the middle of a Boulders Resort residential community many years ago.

Our presence at the Open Meeting was also in support of the Closure Agreement between BMSC and the BHOA which, among other specifics, provides that "BMSC is to renegotiate the Effluent Agreement with the Boulders Resort to allow termination of the [present] agreement." In Decision No. 71865, the Commission found "that the Closure Agreement between BMSC and the BHOA represents a reasonable resolution of the current odor concerns expressed by hundreds of BMSC's customers."

At the BHOA Board meeting on Friday, May 27, 2011, homeowners in attendance were informed that, although BMSC and the Boulders Resort had reached an agreement for the future supply of effluent to the golf courses,

Arizona Corporation Commission

**DOCKETED**

JUN 2 2011

|             |           |
|-------------|-----------|
| DOCKETED BY | <i>MM</i> |
|-------------|-----------|

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2011 JUN - 2 P 4: 08  
AZ CORP COMMISSION  
DOCKET CONTROL

Blackstone Hedge Fund of New York (the parent of many companies and owner of the Boulders Resort) rejected the agreement.

It's impossible to convey the frustration and disappointment felt by Boulders residents upon receiving this news. For years we have lived with the terrible sewer odor in the BMSC system and around the WWTP, which never should have been placed in a residential neighborhood in the first place. We have spent the past nine years complaining to BMSC and registering complaints with the ACC regarding this situation. And no one has worked harder than BHOA past President Les Peterson in communicating with the BMSC, the Boulders Resort and our community to facilitate an agreement among all parties.

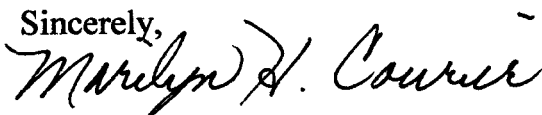
**It is important, at this point, that you know the horrendous sewer odor around the WWTP continues unabated.** It is no longer confined to the early morning and early evening hours. Like a lethal fog, it can roll in at any time. My husband returned from a trip just ten days ago at 11 PM, and was greeted by an extremely strong stench coming from the plant. I, Les Peterson and Ted Wojtasik, the BHOA Property Manager, **have received numerous odor complaints since the August, 2010 Open Meeting. These complaints were not documented; instead, we assured residents that BMSC and the Resort were working on an agreement and progress was being made.**

It is also important to stress that everyone familiar with the Boulders WWTP situation, with few exceptions, agrees that the sewer plant must go.

In closing, I can safely speak for all residents of the Boulders community in expressing our deep appreciation for the comments made in detailing our plight by Administrative Law Judge Dwight Nodes, and the recommendations he strongly stated in his Recommendation, Order and Opinion filed August 3, 2010. We also thank all ACC Commissioners for the opportunity to present our case before you on several occasions from 2006 to 2010.

Our prayer now is that the ACC Commissioners will order the decommissioning and removal of this neighborhood health hazard as soon as possible.

Sincerely,



Marilyn H. Courier  
1043 Boulder Dr.  
Carefree, AZ 83577-2956

SW-02361A-08-0609

ORIGINAL

ARIZONA CORPORATION COMMISSION

UTILITY COMPLAINT FORM

Investigator: Jenny Gomez

Phone:

Fax:

Priority: Respond Within Five Days

Opinion No. 2011 - 95691

Date: 6/9/2011

Complaint Description: 08A Rate Case Items - Opposed  
N/A Not Applicable

Complaint By: First: Virgina Last: Pringle

Account Name: Virgina Pringle

Home: (000) 000-0000

Street:

Work:

City: Scottsdale

CBR:

State: AZ Zip: 85262

is:

Utility Company: Liberty Water-Black Mountain Sewer Corporation

Division: sewer

Contact Name: L

Contact Phone:

Nature of Complaint:

\*\*\*Docket No. SW-02361A-08-0609\*\*\*  
De-commissioning the Boulders WWTP

Arizona Corporation Commission  
1200 West Washington St  
Phoenix, AZ 85007

June 6, 2011

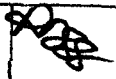
Re: Black Mountain Sewer Corporation  
Docket No: SW-02361A-08-0609  
De-commissioning the Boulders WWTP

Arizona Corporation Commission

DOCKETED

JUN 10 2011

DOCKETED BY



AZ CORP COMMISSION  
DOCKET CONTROL

2011 JUN 10 P 3:35

RECEIVED

Dear Sir,

I support de-commissioning the Black Mountain Sewer Processing Plant located in the middle of our residential neighborhood. I recognize the value of de-commissioning this sewer Processing plant and if there is a cost, it would be modest. We believe it would be a wise investment for the future.

I live down the line from the treatment plant and every morning as we brush our teeth we are awakened by a nauseating odor of sewer fumes. I have tried everything with and without the help of our plumber to rid us of this disgusting morning ritual even to the point of dismantling the sinks and totally cleaning out the line. Until this plant is removed or we leave this house, we appear to be stuck with it.

I have been to many third world countries and this bathroom odor is worse than any bathrooms I have stayed in.

Please consider this as you make your decision. We moved to Arizona to smell the wonderful desert air and

ARIZONA CORPORATION COMMISSION  
UTILITY COMPLAINT FORM

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listen to the wild life, not the constant movement of trucks to and from the plant and to hold our noses as we walk the neighborhood in the morning.

Sincerely,  
Virginia Prindle

Scottsdale AZ 85262  
\*End of Complaint\*

Utilities' Response:

Investigator's Comments and Disposition:

Noted and filed for the record in Docket Control.  
\*End of Comments\*

Date Completed: 6/10/2011

Opinion No. 2011 - 95691

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SW-02361A-08-0609

ARIZONA CORPORATION COMMISSION

UTILITY COMPLAINT FORM

Investigator: Jenny Gomez

Phone: (

Fax:

Priority: Respond Within Five Days

Opinion No. 2011 - 95688

Date: 6/9/2011

Complaint Description: 08A Rate Case Items - Opposed  
N/A Not Applicable

First:

Last:

Complaint By: Edward & Francesca Beach

Account Name: Edward & Francesca Beach

Home: (000) 000-0000

Street:

Work:

City: Scottsdale

CBR:

State: AZ Zip: 85266

is:

Utility Company: Liberty Water-Black Mountain Sewer Corporation

Division: sewer

Contact Name:

Contact Phone:

Nature of Complaint:

\*\*\* Docket No. SW-02361A-08-0609\*\*\*  
Decommissioning the Boulders WWTP

Arizona Corporation Commission  
1200 West Washington Street  
Phoenix, Arizona 85007-2927

June 7, 2011

Re: Black Mountain Sewer Corporation  
Docket No. SW-02361A-08-0609  
Decommissioning the Boulders WWTP

Dear Commissioners,

We are Arizona residents living in the Boulders Community for more than 16 years. We feel compelled to write this letter for two reasons.

First, we continue to support the Closure Agreement between the BMSC, and the BHOA and Decision #71865.

Second, we want to bring to your attention the increased odor problem. While odors have always emanated from this plant, recently the stench has become more pervasive and constant to the extent that our sleep, outdoor activities and lifestyle have been adversely affected.

We urge you to expedite the decommissioning of the Boulders WWTP.

We want to thank the Commissioners for their consideration in this matter.

ARIZONA CORPORATION COMMISSION  
UTILITY COMPLAINT FORM

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Sincerely,  
Edware and Francesca Beach

Scottsdale, AZ 85266  
\*End of Complaint\*

Utilities' Response:

Investigator's Comments and Disposition:

Noted and filed for the record in Docket Control.  
\*End of Comments\*

Date Completed: 6/9/2011

Opinion No. 2011 - 95688

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ORIGINAL

Robert + Kathryn Marshall  
PO Box 5437  
Scottsdale, AZ 85261

June 10, 2011

Re: Black Mountain Sewer Corporation  
Docket No: SW - 02361A - 08 - 0609  
Re - commissioning the Boulders WWTP

Arizona Corporation Commission  
1200 West Washington Street  
Phoenix, AZ 85007 - 2927

Arizona Corporation Commission  
DOCKETED

JUN 14 2011

DOCKETED BY *ASB*

Commissioners : Gary Pierce, Chairman  
Brenda Burns, Commissioner  
Sandra D. Kennedy, Commissioner  
Paul Newman, Commissioner  
Bob Stump, Commissioner

RECEIVED  
2011 JUN 14 P 4:09  
AZ CORP COMMISSION  
DOCKET CONTROL

Dear Commissioners:

We own the residence located at  
1037 Boulder Drive, Carefree Arizona in  
the Boulders Resort. Our home is contiguous  
to the sewer plant owned and operated  
by the Black Mountain Sewer Corporation.  
The plant releases highly noxious gases to  
the atmosphere, which over the last  
several years have become unbearable  
to anyone that resides in or even visits  
(cont'd)

## Arizona Corporation Commission

our home. Last year the situation became intolerable and we were forced, reluctantly to leave our home.

Our granddaughters ages 6 and 9 were visiting from California last summer and we were trying to enjoy our small spa/pool with the girls. At one point, about 7:30 PM the girls complained about the smell from the plant and said it was irritating their eyes and making them feel sick. Finally, we took them inside never to venture outside with them during their visit. Previously we had asked the plant operators to monitor the fumes and they had placed some sort of monitoring device outside our patio. We never received any feedback from the operators on the nature and severity of the fumes even though the device was in place for 4-5 months.

(cont'd)

## Arizona Cooperation Commission

After our granddaughters left we retained CSC, a health + safety engineering and environmental firm in Tempe to investigate the problem. At our expense, CSC came out to the house with a wide array of monitoring devices to measure both air and soil quality and identify the root cause of the problem. Plant management agreed in advance to allow CSC to take measurements directly outside and inside the plant, in addition to readings on our property. Plant management reversed their decision when CSC arrived and would not allow CSC to take measurements on or inside plant property.

CSC finally determined that the principal cause of the noxious fumes was hydrogen sulfide. We then retained CSC to return with  
(cont'd)

⑦

Arizona Corporation Commission

more sophisticated instruments to ascertain the severity of the hydrogen sulfide problem.

In a December 27, 2010 report the CSC summarized their findings and concluded:

"levels observed at the Marshall residence are above the ATSDR odor threshold and are capable of increasing eye symptoms, nausea, headaches, mental symptoms and diseases of the nervous system and sense organs. Furthermore, they are above the WHO 30-minute odor annoyance guideline and the NS EPA Rfc."

after further discussions with CSC we concluded that the noxious fumes represented a significant health hazard and we were thus forced to abandon our beautiful home in the Boulders. We are now renting a house in Scottsdale. We also notified Black Mountain and the Boulders Resort management of the CSC findings.  
(cont'd)

## Arizona Corporation Commission

We pleaded with both organizations to close the plant for health reasons on top of the other issues presently under consideration. To date, no decision from either entity is forthcoming. It appears that this is a classic case of the "approach / avoidance syndrome," wherein both organizations promise to take a certain action and as that decision appears imminent they backtrack. Furthermore, based on our knowledge neither organization has either attempted to investigate the CSC conclusions nor notified the public of a potential health hazard.

In fact the sewer plant remains open because management / owners of both entities appear to place a few blades of brown grass on a golf course, perhaps for a week or two, twice a year, above the health and general well being of affected residents and golfers. Given that the Boulder Resort has knowledge of the CSC  
(cont'd)

## Arizona Corporation Commission

(6)

results and doesn't warn members and golfers represents an extremely untenable situation.

In conclusion, we respectfully request the Commissioners, in the interests of the affected public, to order the plant closed. Left to their own devices neither organization will ever take this decision, believing it is not in their economic interests. In effect, the public be damned is their apparent attitude. This plant has long outlived its usefulness while serving the original needs of the community and returning significant economic benefits to both the plant owners and the resort.

We gratefully acknowledge the work of the Commissioners and Commission staff and hope / trust that you will act to end this public nuisance and potential health hazard. (cont'd)

Thank you for your consideration  
and your service to the  
community.

Respectfully,

Robert B. Marshall  
Kathryn M. Marshall

ORIGINAL

ARIZONA CORPORATION COMMISSION  
UTILITY COMPLAINT FORM

Investigator: [REDACTED]

Phone: [REDACTED]

Fax: [REDACTED]

Priority: Respond Within Five Days

Opinion No. 2011 - 95774

Date: 6/14/2011

Complaint Description: 08Z Rate Case Items - Other  
N/A Not ApplicableComplaint By: Pam Dixon  
First: Pam Last: Dixon

Account Name: Pam Dixon

Home: (000) 000-0000  
Arizona Corporation Commission

Street: n/a

Work: DOCKETED

City: n/a

CBR: JUN 14 2011

State: AZ Zip: 00000

is:

Utility Company: Liberty Water-Black Mountain Sewer Corporation

Division: sewer

Contact Name: Linda Byrd

Contact Phone: (623) 935-9367

## Nature of Complaint:

From: dixonpam@aol.com [REDACTED]

Sent: Monday, June 13, 2011 3:07 PM

To: Utilities Div - Mailbox; Newman-Web; Burns-Web; Pierce-Web; Stump-Web; Kennedy-Web;

Subject: Decommissioning Liberty Water treatment plant in Carefree, AZ

Dear Sirs,

I'm writing to voice my concerns regarding the request that is being brought to you to force the decommissioning of the Liberty Water Co. sewer treatment plant on Boulders Dr. in Carefree, AZ.

I lived right next to the plant for a number of years just recently. Yes, there was an occasional odor which could easily - not cheaply - be remedied by attention to the matter; which Liberty did on and off. The real problem was that a number of owners were having difficulty selling their properties. All of these owners knew the plant was there & purchased anyway. Furthermore, decommissioning the plant will still not solve the problem of odors coming from the sewer covers. At certain times of the year there just are not enough owners in residence to keep the system flowing and odor free. So, getting rid of the plant may not solve the majority of the problem anyway.

My concern is that the entire Carefree community on the Liberty sewer system will now be facing larger monthly sewer bills because a couple of unhappy owners in the Boulders no longer want this plant in their backyard. The owners that live in the Boulders can well afford to pay higher monthly bills. I cannot, and neither can many of my neighbors. We are a 55+ community and many of us live on social security and/or small pensions. The amount we pay for the amount of waste we produce is already outrageous! I don't see why so many other Carefree residents will now have to pay to have our waste shipped a longer distance at what even Town of Carefree officials think will be at greater cost.

RECEIVED  
2011 JUN 14 P 2:30  
AZ CORPORATION COMMISSION  
DOCKET CONTROL



## ARIZONA CORPORATION COMMISSION

### UTILITY COMPLAINT FORM

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If this decommissioning does go through, can you at least regulate that anyone not in the Boulders community be placed on a usage basis for our bills or have a reduced fee for services? If Boulders residents want the plant out - they should pick up the tab for the rest of us.

Long-Time Carefree Resident  
\*End of Complaint\*

#### Utilities' Response:

#### Investigator's Comments and Disposition:

Opinion docketed

From: Bradley Morton  
Sent: Tuesday, June 14, 2011 7:55 AM  
[REDACTED]

Subject: FW: Decommissioning Liberty Water treatment plant in Carefree, AZ

Your opinion has been received and docketed.

Regards  
Brad Morton  
Public Utilities Consumer Analyst II  
[REDACTED]  
\*End of Comments\*

Date Completed: 6/14/2011

Opinion No. 2011 - 95774

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Kari Vitikainen MD  
3064 Ironwood Road  
PO Box 2800-330  
Carefree, AZ 85377

June 7, 2011

Arizona Corporation Commission  
1200 West Washington Street  
Phoenix, AZ 85007-2927

Re: Black Mountain Sewer Corporation  
Docket No: SW-02361 A-08-0609  
De-commissioning the Boulders WWTP

Dear Commissioners,

I write to you in strong support of the letter to you by Ms. Marilyn H. Courier of June 1, 2011. I am a resident of the Boulders community and a member of the Boulders HOA Board.

The nauseating sewer odors from the plant are stronger than ever, and are at times discernable even half a mile from the plant. The Boulders community is unanimous in its wish that the WWTP must be removed.

As there has been no resolution between the Boulders resort and the Black Mountain Sewer Corporation regarding the effluent from the plant, we, as a community, request that you issue an order to have the plant closed.

Respectfully,

Kari Vitikainen, MD

Arizona Corporation Commission  
1200 West Washington Street  
Phoenix, AZ 85007-2927

June 7, 2011

Re: Black Mountain Sewer Corporation  
Docket No: SW-02361A-08-0609  
De-commissioning the Boulders WWTP  
Commissioners: Gary Pierce, Chairman  
Brenda Burns, Commissioner  
Sandra D. Kennedy, Commissioner  
Paul Newman, Commissioner  
Bob Stump, Commissioner

Dear Commissioners,

On August 23, 2010, I was one of the many members of the Boulders Homeowner Association (BHOA) that attended the Arizona Corporation Commission ("ACC") Open Meeting to express the importance of decommissioning and removing the Wastewater Treatment Plant ("WWTP"), owned by Black Mountain Sewer Corporation ("BMSC").

Our presence at the Open Meeting was also in support of the Closure Agreement between BMSC and the BHOA which, among other specifics, provides that "BMSC is to renegotiate the Effluent Agreement with the Boulders Resort to allow termination of the [present] agreement." In Decision No. 71865, the Commission found "that the Closure Agreement between BMSC and the BHOA represents a reasonable resolution of the current odor concerns expressed by hundreds of BMSC's customers."

The horrific odors continue to emanate from this plant. At times it is unbearable. I believe the BHOA has been very cooperative and patient with all parties to try to resolve this situation to everyone's satisfaction. But enough is enough. It is time to implement the terms of Decision No. 71865.

I sincerely appreciate the efforts made by Judge Dwight Nodes and the Commissioners to address this problem in a common sense way. Please continue those efforts and order the decommissioning of this blight on our community as soon as possible.

Edward L. Sambuchi  
3002 Ironwood Road  
Carefree, AZ 85377-5235

Arizona Corporation Commission  
1200 West Washington Street  
Phoenix, Arizona 85007-2927

June 7, 2011

Re: Black Mountain Sewer Corporation  
Docket No. SW-02361A-08-0609  
Decommissioning the Boulders WWTP

Dear Commissioners,

We are Arizona residents living in the Boulders Community for more than 16 years. We feel compelled to write this letter for two reasons.

First, we continue to support the Closure Agreement between the BMSC, and the BHOA and Decision #71865.

Second, we want to bring to your attention the increased odor problem. While odors have always emanated from this plant, recently the stench has become more pervasive and constant to the extent that our sleep, outdoor activities and lifestyle have been adversely affected.

We urge you to expedite the decommissioning of the Boulders WWTP.

We want to thank the Commissioners for their consideration in this matter.

Sincerely,

Edward and Francesca Beach  
7466 E. Arroyo Hondo Rd  
Scottsdale, AZ 85266

TO: Arizona Corporation Commissioners  
1200 West Washington Street  
Phoenix, AZ 85007-2927

FROM: Lawrence L. Michaelis M.D.  
1112 Ocotillo Circle  
PO Box 5262  
Carefree, Az. 85377

Re: Black Mountain Sewer Corporation  
Docket No: SW-02361A-08-0609  
De-commissioning the Boulders WWTP

Dear Commissioners:

I write to express my disdain and frustration with the recent rejection by Blackstone of the previously agreed upon solution to the disgusting situation with the sewer treatment plant within our living environs.

It is hardly necessary to repeat the issues; you are most certainly well aware of the repugnant odors that emanate from the facility and the fact that they are not abating. The homeowners of the Boulders have suffered for over nine years from a situation that never should have occurred at all. It has gone on way too long and must now come to an end. The associated health risks to our residents are self evident and are surely appreciated and shared by the Commissioners.

I fully support the comments made in detailing this needless dilemma by Judge Dwight Nodes in his recommendations filed on August 3, 2010. I also wish to reaffirm the gratitude of my neighbors for the previous courtesies of allowing presentations to you on this repulsive situation.

I sincerely hope you will support the final decommissioning and removal of this blight within our neighborhood.

Thank you for your attention to my letter. I am hopeful for your support in providing a remedy to this vile state of affairs.

Sincerely,

Lawrence L. Michaelis M.D.

John L. and Suzanne Smucker  
1601 N. Quartz Valley Dr.  
P.O. Box 2015  
Scottsdale, AZ 885266

Arizona Corporation Commission  
1200 West Washington Street  
Phoenix, AZ 85007-2927

June 7, 2011

Re: Black Mountain Sewer Corporation  
Docket No: SW-02361A-08-0609  
De-commissioning the Boulders WWTP

Commissioners: Gary Pierce, Chairman  
Brenda Burns, Commissioner  
Sandra D. Kennedy, Commissioner  
Paul Newman, Commissioner  
Bob Stump, Commissioner

Dear Commissioners:

We are new residents of The Boulders as of January 2011. Our house is about 100 yards from the Waste Water Treatment Plant ("WWTP") which is owned by Black Mountain Sewer Corporation ("BMSC").

We were shocked to experience the acrid and nauseating gas being emitted from the plant. We found that this gas made us dizzy and nauseated after breathing it through the night. Closing windows and running the air conditioner did not seem to help. These concentrated emissions continue from about 10 PM to 6AM every night with no relief.

We reported the problem to The Boulders' Management and they assured us that plans were moving ahead to close the facility. It is now apparent that The Boulders and Black Mountain Sewer Corporation are unwilling to negotiate a plan for decommissioning and removing the WWTP.

We are appealing to the Commission to order this plant decommissioned and removed immediately before someone is seriously injured from this health hazard.

Sincerely,

John & Suzanne Smucker

Terry and Eli Murray  
P.O. Box 6103  
1044 Boulder Drive  
Carefree, Arizona 85377

June 8, 2011

Arizona Corporation Commission  
1200 West Washington Street  
Phoenix, Arizona 85007-2927

re: Black Mountain Sewer Corporation  
Docket No: SW-02361A-08-0609  
De-Commissioning the Boulders Wastewater Treatment Plant

Commissioners:

Gary Pierce, Chairman  
Brenda Burns, Commissioner  
Sandra D. Kennedy, Commissioner  
Paul Newman, Commissioner  
Bob Stump, Commissioner

Dear Commissioners:

We live in the Boulders in close proximity to the Boulders Wastewater Treatment Plant ("WWTP") and are writing to add our voices to those noting the continued presence of extremely unpleasant odors from the plant. We recently had our family here for a week (during early May) and there were days when we could not let the children go outside (ages 5, 4 and 2) and days where we had to leave our house to avoid the noxious odors.

It is extremely disappointing to see that this multi-year process, in which it seemed that the parties were attempting to come to some resolution, has now stalled. It is our hope that the Commission can do something to ensure that this plant is finally shut down.

Sincerely

Terry and Eli Murray

Terry and Eli Murray